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Supreme Court, U.S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.,
Petitioners,

—v.—

ARLO TATUM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED AUGUST 25, 1971
CERTIORARI GRANTED NOVEMBER 16, 1971

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOCKET ENTRIES

1970

February 17—Complaint, appearance, exhibits A, B, C, & D.

February 17—Summons copies (6) and copies (6) of Complaint issued. A. G. ser. 2-18; D.A. ser 2-18; No. 1 ser 2-20; No. 2 ser. 2-20; No. 3 ser 2-20.

March 12 —Motion of pltf. for temporary restraining order; c/m 2-12-70, filed.

March 12 —Motion of pltf. for preliminary injunction; P&A in support of temporary order and a preliminary injunction; affidavit (2); exhibit A thru J; c/m 3-12-70; M.C. filed.

March 13 —Proposed temporary restraining order denied; set down for hearing—usual course on preliminary injunction. (N) (fiat) McGuire, J.

March 19 —Opposition of deft. to motion for a preliminary injunction; affidavit; c/m 3-19-70, filed.

March 23 —Motion of defts. to dismiss; P&A p/s 3-20-70; M.C.; appearance of Benjamin C. Flannagan, filed.

April 29 —Order granting with prejudice defts' motion to dismiss; pltfs' motion for preliminary injunction denied as moot. (N) Hart, J.

May 4 —Notice of appeal by pltfs. from order of April 29, 1970; copies mailed to Walter Yeagley, Asst. U.S. Attorney; deposit by Speiser $5.00, filed.

May 5 —Record on Appeal delivered to USCA; deposit by Lawrence Speiser $1.10.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

24203

DOCKET ENTRIES

DATE	
5- 5-70	Certified original record (including transcript of proceedings, pgs 1 & 2, 1-46) (n)
5- 5-70	4-Appellants' motion for summary reversal of order dismissing complaint or for expedited processing of this appeal (p-4)
5-11-70	4-Appellees' opposition to motion for summary reversal and motion for summary affirmance (m-11)
6-12-70	Per Curiam order denying appellant's motion for summary reversal and expedited processing and appellee's motion for summary affirmance, Fahy, Sr. C.J., McGowan, C.J.
6-12-70	4-Appellants' motion for leave to file motion for extension of time to file brief (m-12)
6-24-70	Order per Wilkey, ACJ extending time to file appellant's brief to July 15th
7-13-70	4-Appellants' motion for leave to file deferred appendix (m-7)
7-24-70	Order per Judge Wright granting appellants' motion for leave to proceed under Rule 30 (c) of the F.R.A.P.
7-24-70	1-Appellants' brief (m-15)
8-17-70	1-Appellee's brief (m-17)
10- 1-70	25-Appellants' brief (m-1)
10- 2-70	4-Appellants' motion for leave to file appendix, time having expired (m-2)

DOCKET ENTRIES

DATE	
10- 8-70	Clerk's order granting appellant's motion for leave to file appendix, late
10- 8-70	10-Appendix (m-30)
10-14-70	25-Appellees' brief (m-14)
1-13-71	4-appellants' motion for leave to file reply brief (m-11)
1-15-71	Clerk's order granting appellant's motion for leave to file reply brief, late
1-15-71	25-Appellant's reply brief (p-11)
1-20-71	Argued before Tamm, MacKinnon and Wilkey, CJ on motion of Mrs. Hope Eastman, Frank Askin, Esq. a member of the bar of the Supreme Court of New Jersey was allowed to argue pro hac vice for appellant
2- 3-71	4-Counsel motion for leave to withdraw as co-counsel (m-2)
2-10-71	Order CJ Bazelon granting motion of Lawrence Speiser, for leave to withdraw as co-counsel
4-27-71	Opinion by Circuit Judge Wilkey
4-27-71	Opinion by Circuit Judge MacKinnon, concurring in part and dissenting in part
4-27-71	Judgment reversing judgment of the District Court, and remanding case to the District Court for further proceedings consistent with opinion (n)
5-18-71	4-Appellee's motion for stay of mandate (m-18)
6- 2-71	Per Curiam Order by the Clerk granting appellee's motion to stay the mandate; the Clerk is directed to stay the issuance of the opinion and certified copy of this Court's judgment of April 27th to and including June 17th. The stay shall be subject to the provision of Rule 41(b) of the Federal Rules of Appellate Procedure.

DOCKET ENTRIES

DATE	
6-17-71	4-Appellees' motion for stay of mandate (m-17)
7-17-71	Per Curiam Order by the Clerk granting appellee's motion for stay of mandate; directing Clerk to stay the issuance of the mandate to July 19th. Tamm, MacKinnon and Wilkey, Circuit Judges.
7-16-71	4-Appellee's motion for stay of mandate (m-16)
7-27-71	Per Curiam order granting appellee's motion for stay of mandate, Clerk is directed to stay the issuance of the opinion, and certified copy of this court's judgment to August 25. Tamm, MacKinnon and Wilkey, CJ
8-27-71	Notice of filing for Petition for Certiorari on August 25, 1971 (S.C. #71-288 O.T. 71)
11-22-71	Certified copy of order of Supreme Court granting petition for certiorari on November 16th (S.C. 71-288)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 459-70

ARLO TATUM, Central Committee for Conscientious Objectors, 2016 Walnut St., Philadelphia, Pa., 19103; WOMEN STRIKE FOR , 2016 P St., N.W., Washington, D.C. 20036; CONRAD LYNN, 401 Broadway, New York, N.Y. 10003; CHICAGO AREA WOMEN FOR PEACE, 343 S. Dearborn, Chicago, Ill. 60604; VIETNAM WEEK COMMITTEE OF THE UNIVERSITY OF PENNSYLVANIA by its members Richard M. Feigenberg, 928 Chestnut St., Philadelphia, Pa. 19107, Lawrence R. Cohen, 3413 Race St., Philadelphia, Pa., 19104, and Frederick W. Stanton, 4830 Walton Ave., Philadelphia, Pa. 19143; VIETNAM EDUCATION GROUP c/o Hamlin, 1400 Murray Drive, N.W. Knoxville, Tenn. 37912; REV. ALBERT B. CLEAGE, JR., c/o Shrine of the Black Madonna, 7625 Linwood Ave., Detroit, Mich. 48206; VETERANS FOR PEACE IN VIETNAM, 431 S. Dearborn St., Chicago, Ill. 60605; BENJAMIN N. WYATT, JR., 1718 West Santa Barbara Ave., Los Angeles, Calif. 90062; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, 1155 - 15 St. N.W., Wash., D.C., AND ITS LOCAL 1733, Memphis, Tenn.; VIETNAM MORATORIUM COMMITTEE, 1029 Vermont Ave., N.W., Wash., D.C. 20005, CLERGY AND LAYMEN CONCERNED ABOUT VIETNAM, 475 Riverside Drive, New York, N.Y. 10027; WAR RESISTERS LEAGUE, 339 Lafayette St., New York, N.Y. 10012, PLAINTIFFS

v.

MELVIN B. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army, GENERAL WILLIAM C. WESTMORELAND, Chief of Staff, United States Army; BRIG. GENERAL WILLIAM H. BLAKEFIELD, Commanding General, U.S. Army Intelligence Command, DEFENDANTS

COMPLAINT

Plaintiffs, by their attorneys, allege as follows:

JURISDICTION

1. This is a civil action for declaratory and injunctive relief. The jurisdiction of this court arises under 28 U.S.C. §§ 1331, 1361, 2201 and 2202, and under the Constitution of the United States, in particular Article III and the First and Fourth Amendments. The amount in controversy is in excess of $10,000.

PARTIES

2. *Plaintiffs*

1) Arlo Tatum is Executive Secretary of the Central Committee for Conscientious Objectors, an unincorporated association. The purposes of the Central Committee for Conscientious Objectors are to maintain freedom of conscience, to interpret the moral and legal basis of conscientious refusal to participate in war, to counsel and assist conscientious objectors to conscription, civil defense, and the payment of taxes for military purposes, and to encourage an end to conscription.

2) Women Strike for Peace, an unincorporated association, is an organization of women which demands of governments that nuclear weapons tests be banned forever, that the arms race end, and that the world abolish all weapons of destruction under United Nations safeguards. It also urges immediate planning at local, state, and national levels for a peacetime economy with freedom and justice for all.

3) Conrad Lynn is a black attorney admitted to practice before the New York State Court of Appeals. He has long been active in the fight for racial justice.

4) Chicago Area Women for Peace, an unincorporated association, is an organization of women opposed to United States participation in the war in Vietnam, against nuclear testing and against militaristic societies.

5) The Vietnam Week Committee of the University of Pennsylvania, is an unincorporated association. The purpose of the Vietnam Week Committee was to organize opposition to the Vietnam War. Richard M. Feigenberg is former Chairman of the Committee. Lawrence R.

Cohen and Frederick W. Stanton are former members of the Committee.

6) The Vietnam Education Group (Knoxville, Tenn.) is an unincorporated association whose purpose is to educate the public about the United States' role in the Vietnam war.

7) Rev. Albert B. Cleage, Jr. is Minister of the Shrine of the Black Madonna, Detroit, Michigan, and an advocate of black self-determination. He is a columnist for *The Chronicle*, a black newspaper published in Detroit.

8) Veterans for Peace in Vietnam, an unincorporated association, is composed of veterans of the armed forces of the United States who are opposed to the United States' participation in the Vietnam war.

9) Benjamin N. Wyatt, Jr. is a black attorney admitted to practice in the State of California. He has long been active in the fight for racial justice.

10) The American Federation of State, County and Municipal Employees is an unincorporated association of working men and women in government-employment. Its Local 1733, Memphis, Tenn., represents employees of the City of Memphis including its Department of Sanitation.

11) The Vietnam Moratorium Committee, an unincorporated association, was formed to call attention to American Vietnam policy. The Moratorium seeks to build a broad based coalition of people opposed to present policy and supporting immediate withdrawal of American troops.

12) Clergy and Laymen Concerned About Vietnam is an unincorporated association of clergymen and laymen opposed to America's participation in the war in Vietnam. It seeks to educate the public about the facts of the war and the American role in that war.

13) War Resisters League, an unincorporated association, believes war to be a crime against humanity. The WRL, founded in 1923, advocates Gandhian non-violence as the method for creating a democratic society free of war, racism and human exploitation.

Defendants

3. The defendants Laird, Resor, Westmoreland and Blakefield are, respectively, the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the Army, and the Commanding General, U.S. Army Intelligence Command, and together have responsibility for the administration of the programs and policies challenged in this action. They are sued individually and in their official capacities.

CLASS ACTION

4. The plaintiffs sue on their own behalf and on behalf of all other individuals and organizations who wish to exercise their right under the First Amendment of the United States Constitution to engage in peaceful political protest, demonstrations, marches, rallies, church meetings and other forms of constitutionally protected expression and assemblies without surveillance by defendants' agents and without becoming the subject of dossiers, reports, and files, defendants' data bank and intelligence network. Such individuals and organizations constitute a class too numerous to bring before the court. There are common questions of law and fact affecting all members of the class and common relief is sought. The class is fairly and adequately represented by plaintiffs herein.

CAUSE OF ACTION

5. Plaintiffs seek the court's protection of their right to engage in lawful political activity guaranteed by the First Amendment to the United States Constitution without fear of harassment, intimidation and injury resulting from investigation, surveillance and record keeping by military authority.

6. The defendants, through the investigative and intelligence agencies of the United States armed forces, and in particular the U.S. Army Intelligence Command, which they manage and control, are engaged in the surveillance of lawful and peaceful civilian political activity within the United States.

7. The information collected in the course of this surveillance, including all of the information known by the plaintiffs to have been collected concerning them, serves no legitimate military purpose.

8. Much of the information on lawful political activity included in the Army's files and dossiers was acquired by defendants' agents surveillance of lawful and peaceful political activities, by anonymous informants, and through the use of photographic and electronic equipment. Other information in these files was obtained from local and state police departments and from the Federal Bureau of Investigation.

9. The information collected by the defendants' agents is regularly, widely and indiscriminately circulated via military teletype maintained by defendants. This network provides every major Army troop command in the continental United States and military headquarters in Europe, Alaska, Hawaii and Panama with daily and weekly reports on virtually all political protest occurring anywhere within the United States.

10. Attached as Exhibit A to this complaint and made part thereof is a sample of the reports circulated over the aforementioned teletype. The attached report was circulated on or about March 18, 1968. It includes details of entirely lawful and constitutionally protected political activity engaged in by plaintiffs and others. Plaintiffs numbered 1-10 in paragraph 2. above are specifically named in Exhibit A. Plaintiffs numbered 11-13, on information and belief, have been named in other similar reports.

11. The defendants and their agents publish an eight-by-ten-inch glossy paperback booklet known in Army intelligence circles as the "Blacklist." This list is believed to be an encyclopedia of profiles of individuals and organizations who, in the opinion of its compilers, "might cause trouble for the Army."

12. Defendants and their agents store information about the lawful and peaceful political activities of the plaintiffs and other civilians in a computerized data bank located at the U.S. Army Intellgence Command Headquarters, Fort Holabird, Maryland. The office responsi-

ble for these records is the "CONUS Intelligence Branch, Operations IV, U.S. Army Intelligence Command." This office maintains computerized and non-computerized records of the political activities of the plaintiffs and other civilians which are of no lawful interest to the defendants and their agents. These records include reports pertaining to individuals and organizations, and reports pertaining to lawful political events.

13. Defendants plan to make the information contained in the data bank, mentioned in the preceding paragraph, available to numerous federal and state agencies upon request.

14. The information contained in the foregoing paragraphs numbered five through thirteen was published in the January 1970 issue of the magazine *The Washington Monthly*, in an article entitled "CONUS Intelligence: The Army Watches Civilian Politics" by Christopher H. Pyle, a former Captain in Army Intelligence. A copy of that article is attached hereto as Exhibit B. A synopsis of that article was contained in a news story in *The New York Times* on January 16, 1970. A copy of *The New York Times* dispatch is attached hereto as Exhibit C. The substance of the Pyle article was confirmed by the Army in response to inquiries by Morton Kondracke, a reporter for the Chicago *Sun-Times*. A copy of his article of January 27, 1970, syndicated in the *New York Post*, is attached hereto as Exhibit D.

15. The purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate plaintiffs and other similarly situated and to deter them from exercising their rights of political expression, protest and dissent from government policies which are protected by the First Amendment by invading their privacy, damaging their reputations, adversely affecting their employment and their opportunities for employment, and in other ways.

16. The effect of defendants' activities described herein and the widespread publicity given thereto is to cast a pall over lawful political protest in the United States and to deter plaintiffs and other similarly situated from

exercising their First Amendment rights for fear they will be made subjects of reports in the Army's intelligence network, that permanent reports of their activities will be maintained in the Army's data bank, that their "profiles" will appear in the so-called "Blacklist" and that all of this information will be released to numerous federal and state agencies upon request.

17. The conduct of the defendants described herein deprives plaintiffs and persons similarly situated of the rights of free speech and association, the right to petition their government for redress of grievances, and the right of privacy guaranteed and protected by the First, Fourth, Fifth and Ninth Amendments to the Constitution of the United States, and deprives all Americans of basic First Amendment rights by inhibiting and curtailing free and open discussion of issues of public importance.

18. The establishment and administration by the defendants and their agents of the intelligence program described above, exceeds the lawful needs and authority of the United States Army and is without any lawful statutory authority.

19. Plaintiffs have no adequate remedy at law, and unless and until this court grants declaratory and injunctive relief to halt the activities described in this complaint, irreparable injury will continue to be done to plaintiffs and all other similarly situated as well as to the national interest.

WHEREFORE, PLAINTIFFS PRAY FOR THE FOLLOWING RELIEF:

1. A declaratory judgment that the surveillance, collection, maintenance, storage and distribution of information about the lawful political activities of the plaintiffs and persons and organizations similarly situated—including the publication known as the "Blacklist"—is unconstitutional.

2. Preliminary and permanent injunctions restraining the defendants, their agents, and their employees, from spying on, surveilling, collecting information about, and maintaining records and dossiers of any kind about the

lawful political activities of plaintiffs and persons and organizations similarly situated within the United States.

3. A mandatory injunction ordering the defendants to produce before this court, for destruction, all blacklists, publications, records, reports, photographs, recordings, data computer tapes and cards, and other materials describing the lawful political activities of the plaintiffs and other persons and organizations similarly situated and maintained by any and all military agencies within the United States and overseas.

4. A permanent injunction forbidding the defendants, their agents, and their employees from attaching any security classification to intelligence records pertaining to lawful political activity within the United States.

5. Any other and further relief which the court may deem just and proper in the circumstances.

FRANK ASKIN
180 University Avenue
Newark, New Jersey 07102

MELVIN L. WULF
American Civil Liberties Union
156 Fifth Avenue
New York, N.Y. 10010

LAWRENCE SPEISER
American Civil Liberties Union
1424 - 16th St., N.W.
Washington, D.C. 20036
Attorneys for Plaintiffs

EXHIBIT A TO COMPLAINT

AIC 116 HQ

AIC CONUS HQ

P-IrI8452 Mar 68

From: CGUSAINTC FTHOLABIRD MD

To: AOC, PENTAGON

Info: EOC, CONARC
CINC, USSTRICOM
CINC, USAREUR
CINC, USARPAC (THRU 710TH MI DET)
CG, USARSO (VIA REGISTERED MAIL
CG, USARAL (VIA REGISTERED MAIL)
CG, AMC (THRU USAINTC LNO)
CG, ARDCOM (THRU 113TH MI GP)
CG, USASTRATCOM (THRU 115TH MI GP)
CG, FIRST ARMY (THRU 109TH MI GP)
CG, THIRD ARMY (THRU 111TH MI GP)
CG, FOURTH ARMY (THRU 112TH MI GP)
CG, FIFTH ARMY (THRU 113TH MI GP)
CG, SIXTH ARMY (THRU 115TH M GP)
CG, XVIII ABM CORPS
CG, III CORPS (THRU DCSI FOURTH ARMY)
CG, MDW (THRU 116TH MI GP)
CG, 1ST ARMD DIV (THRU DCSI FOURTH ARMY)
CG, 2D ARMD DIV (THRU DCSI FOURTH ARMY)
CG, 82D ABN DIV (THRU XVIII ABN CORPS)
CG, 5TH INF DIV (THRU DCSI FIFTH ARMY)
PHG, USA
CG, USARHAW (THRU 710TH MI DET)
CG, FT DEVENS (THRU 108TH MI GP)
CO, 902D MI GP (THRU 116TH MI GP)
CO, 108TH MI GP
CO, 109TH MI GP

CO, 111TH MI GP
CO, 112TH MI GP
CO, 113TH MI GP
CO, 115TH MI GP
CO, 116TH MI GP
CO, 710TH MI DET
DIRECTOR ANMCC (PASS TO DIA ELEMENT—)
USAINTC LNO, PENTAGON

SUBJECT: USAINTC WEEKLY INTELLIGENCE SUMMARY NUMBER 68-12

The following summary contains items of intelligence interest for the period 0600 hrs, Monday 11 March 68 to 0600 hrs, Monday 18 March 68 and information concerning significant future events:

SECTION I: THE PAST WEEK

Monday, 11 March 1968

Hartford, Conn.: Approximately 20 persons picketed outside the U.S. Federal Building. The protestors carried placards denouncing the war in Vietnam and the payment of income tax. The demonstration was sponsored by the Voluntown, Conn., Chapter of the New England Committee for Non-Violent Action.

Tuskegee, Alabama: Stokley Carmichael spk to a group of about 2000 Tuskagee Institute (TI) students concerning the black power philosophy. He indicated that negroes should arm themselves for protection against "Whitey," and that they should fight in the United States and not in Vietnam. His speech was followed by a question and answer period. At the end of the session, the crowd dispersed quietly and without incident.

Tuesday, 12 March 1968

Boston, Mass.: An estimated 85 demonstrators representing the New England Resistance gathered at the gates of the Boston Army Base to protest the induction

of Peter Crews. There was one scuffle between protestors and a counter protestor. As a result, extra police were called to the scene. The demonstration terminated without further incident. The demonstrators paraded to the University of Massachusetts in Boston, where another brief demonstration was held. There were no incidents at the latter demonstration.

Buffalo, N.Y.: Demonstrators were observed picketing in front of the Buffalo Afees Station for the second consecutive day. On 11 Mar. there were only 12 pickets, but on 12 Mar. approximately 25-30 demonstrators were observed. These individuals were believed to be members of the SDS from State University of New York at Buffalo.

Wednesday, 13 March 1968

Brooklyn, N.Y.: About 35 persons participated in a demonstration at the main gate of Fort Hamilton to protest the scheduled induction of Peter Behr. Many of the protestors distributed leaflets and flowers to persons entering the Fort. The demonstration lasted approximately one and one half hours and ended without incident.

Columbia, S.C.: Approximately 200 negroes from Allen University and Benedict College in Columbia joined a group of about 900 students from South Carolina State College (SCSC) and Claflin College, Orangeburg, S.C., in a demonstration at the State Capitol Building. This protest was a continuance of the demonstration held by SCSC students at Capitol on 7 Mar 68 (reference USAINTC Weekly Summary Number 68-11). About 20 South Carolina state patrolmen equipped with batons, pistols, gas masks and steel helmets were on hand to prevent any violence. Following an unsuccessful attempt by approximately 30 negro demonstrators to enter the State Capitol, the Orangeburg protestors re-boarded thirteen chartered buses and returned to their respective schools. During the demonstration about fifteen negroes, including James Weston, Sociology Professor at SCSC, were admitted to the Governor's office for a brief conference. There are no details about what took place in his office.

Minneapolis, Minn.: Approximately 25 persons from Eau Claire, Wisconsin, demonstrated in front of the Washington Avenue AFEES, after protesting the Selective Service System in general and specifically the pre-induction processing of Steve Smith from Eau Claire. There was no violence. While undergoing processing, Smith took several pictures of AFEES personnel and some rooms in the building. He was also seen taking notes on the induction process.

Madison, Wisconsin: Approximately 50 members of the Community Action Party staged a demonstration at Bascom Hall on the University of Wisconsin Campus. They were picketing a team of recruiters from Boeing Aircraft Company (reference USAINTC Weekly Summary Number 63-11). The entire demonstration was peaceful and there were no incidents.

Los Angeles, Calif.: Approximately 100 members of the resistance staged a peaceful demonstration at the Los Angeles AFEES, in support of Bill Garraway who was scheduled for induction. No incidents were reported, and the demonstrators dispersed peacefully.

San Jose, Calif.: An Anti-Dow Chemical Company demonstration was held in front of the Administration Building at San Jose State College (SJSC). A crowd of about 400-500 persons were present, but approximately 90% of these were spectators or curious onlookers. At 1230 hrs. the demonstrators moved to the Morris Daily Auditorium where they were refused permission to hold a rally. SJSC officials, however permitted the protestors to use the music building for an afternoon rally. The rally received very little support and attendance was light.

Thursday, 14 March 1968:

Memphis, Tenn.: After several days of peaceful marches and meetings, members of the Sanitation Union became involved in an attempt to block trash removal by non-union workers (reference USAINTC Weekly Summary 68-11). The incident resulted in the arrest of about 30 persons on charges of disorderly conduct. Earlier in

the day, 6 persons had been arrested by Memphis police for attempting to delay the departure of garbage trucks from the department of sanitation parking lot. To date, there are no indications that an early settlement in the sanitation strike will be reached.

Friday, 15 March 1968:

Philadelphia, Pa.: A. The Philadelphia Chapter of the Women's Strike for Peace sponsored an anti-draft meeting at the First Unitarian Church which attracted an audience of about 200 persons. Conrad Lynn, an author of draft evasion literature, replaced Yale Chaplain William Sloan Coffin as the principal speaker at the meeting. Following question and answer period Robert Edenbaum of the Central Committee for Conscientious Objectors stated that many Philadelphia lawyers were accepting draft evasion cases. The meeting ended without incident.

B. Rev. Albert Cleage, Jr., the founder of the Black Christian Nationalist Movement in Detroit, spoke to an estimated 100 persons at the Emmanuel Methodist Church. Cleage spoke on the topic of black unity and the problems of the ghetto. The meeting was peaceful and police reported no incidents.

Washington, D.C.: David Dellinger of the National Committee to end the war in Vietnam joined two other anti-war speakers in an appearance before a group of about 55 persons who had gathered in Judiciary Square to demonstrate their opposition to the war in Vietnam. The group subsequently marched on the offices of the Internal Revenue Service (IRS) and picketed outside while a delegation spoke with IRS officials. A spokesman for the delegation indicated that they would refuse to pay that portion of their income tax which went to finance the Vietnam war. After the delegation returned from the peaceful confrontation, the entire group dispersed without incident.

Detroit, Mich.: A group of about 100 persons gathered in front of the Fort Wayne Induction Center to protest the scheduled induction of Tom Nixon, a leader of the Detroit Draft Resistance Committee (DRC). The

protestors displayed anti-draft/Vietnam placards and passed out anti-draft literature which had been printed by the socialist workers party. Nixon arrived at the induction center but refused to begin processing and a federal marshal arrested him. There were no further incidents and the demonstrators dispersed quietly.

Chicago, Ill.: Approximately 30 members of the Chicago Area Draft Resistors (CADRE) participated in a peaceful demonstration in front of the Van Buren Street AFEES. The protestors were apparently demonstrating in support of Robert Freestom, an active CADRE member who was scheduled for induction. The demonstrators dispersed without incident and police made no arrests.

Saturday, 16 March 1968:

Providence, R.I.: Vice President Hubert Humphrey arrived at the Sheraton Biltmore and entered the hotel without incident although approximately 75 demonstrators were picketing the entrance. At 1515 hrs. a group of about 1000 students and faculty members from Brown University (BU) Rhode Island School of Design and Pembroke College marched from the BU campus to a park across from the hotel. A petition bearing names of those who would refuse to be drafted was taken into the hotel by a delegation from the group. Of the 537 names reportedly on the petition, about 340 belonged to women students at Pembroke College. At 1625 hrs. the Vice President departed the hotel without incident. A few of the demonstrators remained in the area overnight, but there were no incidents and police made no arrests.

Riverside, Calif.: During the 50th Anniversary Celebration Parade at March Air Force Base, a group of about 30 protestors began a parallel march to protest the war in Vietnam. The protestors wore black arm bands and carried anti-war placards. The anti-war group made no attempt to interfere with the parade and police made no arrests.

Sunday, 17 March 1968:

Washington, D.C.: A. About 21 members of an organization known as Movimento Insurrectional De Recuperacion Revoluncionaria (MIRR) participated in a peaceful demonstration at the White House. The demonstrators carried placards which reflected their support for American policy in Vietnam. (Note: This group was previously reported as the Movement Insurrectional Recooperation—Mir. reference USAINTC Weekly Summary Number 68-11)

B. Stokley Carmichael of the Student Non-Violent Coordinating Committee (SNCC), spoke at the church of the redeemer in Washington, D.C. to an unknown number of people on black power and the black united front, urging all black people to come together. Carmichael ended the speech with words from Rap Brown, "We shall conquer without a doubt". He indicated that March 20 would be International Rap Brown Day (See Wednesday, 20 March 1968). There was no violence and no arrests were made.

Chicago, Ill.: Approximately 300 members of veterans for Peace and Women for Peace held a peaceful demonstration at the Museum of Science and Industry protesting an exhibit by the US Army. Several demonstrators entered the building in spite of warnings by museum officials and 6 were arrested on charges of disorderly conduct, resisting arrest and criminal trespassing. Five of those arrested were juveniles.

Los Angeles, Calif.: Approximately 250-300 negroes staged a mock trial for a Los Angeles police officer. The incident resulted from the shooting of a Los Angeles negro by the officer. The demonstration was sponsored by the Los Angeles Student Non-Violent Coordinating Committee, the Black Panthers and "US". Speakers included Reverend Clayton D. Russell, Head of People's Independent Church, Los Angeles; Ben Waytt, Los Angeles negro attorney; and Franklin Alexander, Southern California District Representative, Communist Party, USA. The demonstrators passed out "Wanted" posters of the officer, and found him "Guilty of First Degree Murder." The demonstration was peaceful.

SECTION II: FORECAST OF FUTURE EVENTS

Monday, 18 March 1968:

Miami, Fla.: A spokesman for the Southern Students Organizing Committee announced plans for a demonstration to be held on the campus of the University of Miami during the morning. According to the spokesman, a group of anti-war/draft supporters will participate in the demonstration.

Baltimore, Md.: Members of the Baltimore Inter-Faith Peace Mission intend to demonstrate at the Baltimore U.S. Post Office to support the four individuals on trial for pouring blood into the records of the Selective Service Board on 27 Oct. 1967.

Monday, 18 March—Tuesday, 19 March 1968:

Philadelphia, Pa.: Members of the Vietnam Week Committee composed largely of professors and students of the University of Pennsylvania, will conduct a "sleep-in" to protest the scheduled appearance of Dow Chemical Company recruiters on campus. The next day, 19 March, the same organization will sponsor a protest rally on campus.

Tuesday, 19 March—Wednesday, 20 March 1968:

Sacramento, Calif.: On 19 Mar. a draft resistance rally has been scheduled on the campus of Sacramento State College for the purpose of attracting support for 5 persons who plan to refuse induction on the following day. The rally will be sponsored by the Sacramento Draft Resistance Union. On 20 Mar. the demonstrators will allegedly attempt to disrupt the induction processing of the 5 individuals at the Selective Service Building. At the present time, there are no indications as to the number of persons who will participate in either demonstration.

Wednesday, 20 March, 1968:

New Orleans, La.: A spokesman for SNCC has proclaimed that 20 March will be officially designated as "H. Rap Brown Day". According to the spokesman, sympathy demonstrations are scheduled for the following cities: Washington, D.C.; Detroit, Michigan; and, Atlanta, Georgia. At the present time, specific details concerning the number of participants and the exact locations of the demonstrations are unknown.

Thursday, 28 March 1968

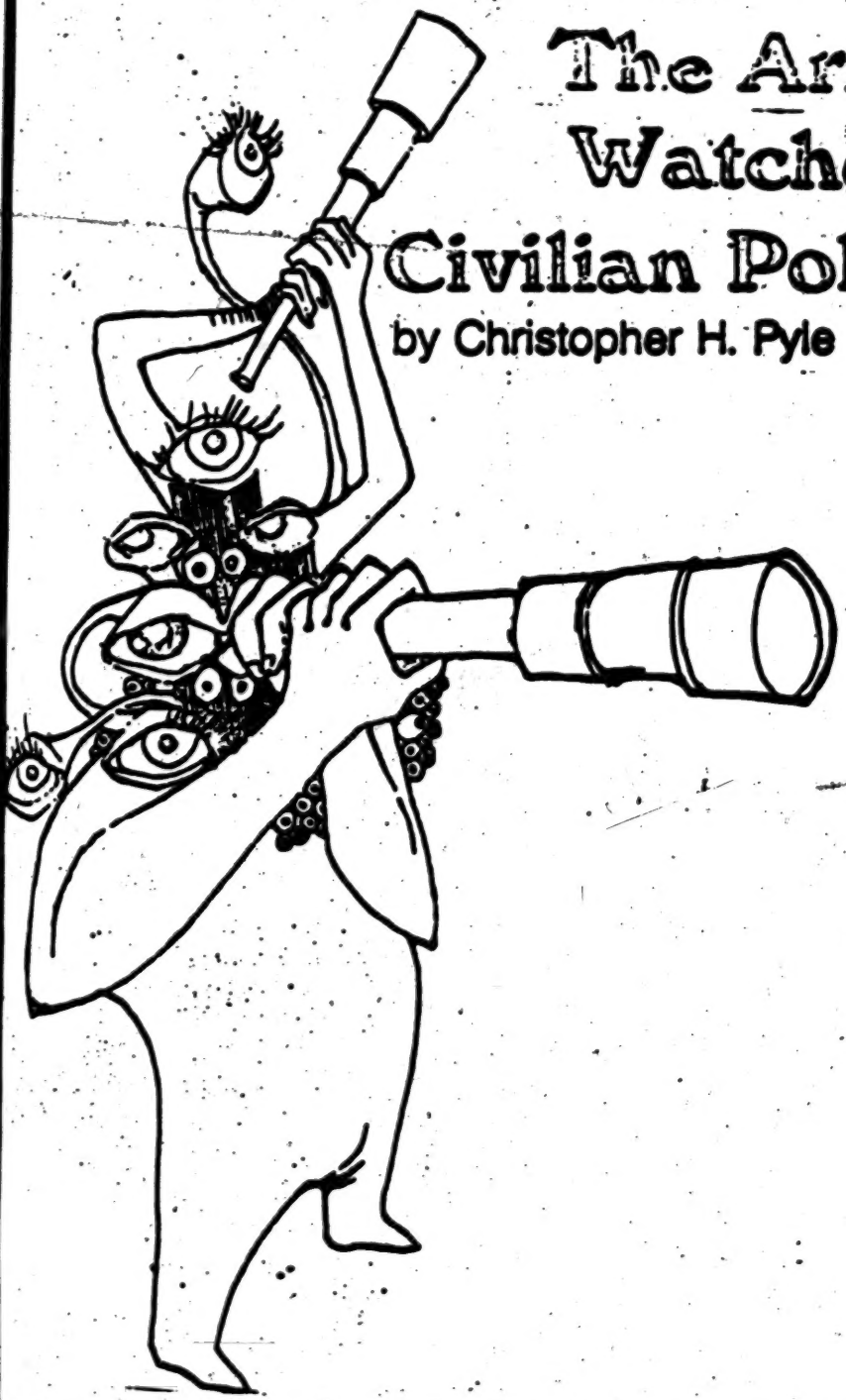
Knoxville, Tenn.: An unchartered chapter of the Vietnam Education Committee at the University of Tennessee has scheduled an anti-war demonstration in protest of the appearance of General Lewis Hershey, Director of the Selective Service System.

This command will publish periodic special interest summaries to addressees in addition to the regular weekly summary whenever upcoming events of unusual importance develops within Conus.

DOUGHERTY FOR BLAKEFIELD

EXHIBIT B

CONUS Intelligence:



The Army Watches Civilian Politics

by Christopher H. Pyle

ristopher H. Pyle, a Ph.D. candidate at Columbia University, has recently completed two ars service as a captain in Army Intelligence. The information in this article comes from brief- s he received at the headquarters of the U.S. Army Intelligence Command, and from observations of friends and acquaintances who served in intelligence units throughout the States and Europe. None of it carries a security classification of any kind.

For the past four years, the U.S. Army has been closely watching civilian political activity within the United States. Nearly 1,000 plainclothes investigators, working out of some 300 offices from coast to coast, keep track of political protests of all kinds—from Klan rallies in North Carolina to anti-war speeches at Harvard. This aspect of their duties is unknown to most Americans. They know these soldier-agents, if at all, only as personable young men whose principal function is to conduct background investigations of persons being considered for security clearances.

When this program began in the summer of 1965, its purpose was to provide early warning of civil disorders which the Army might be called upon to quell. In the summer of 1967, however, its scope widened to include the political beliefs and actions of individuals and organizations active in the civil rights, white supremacy, black power, and anti-war movements. Today, the Army maintains files on the membership, ideology, programs, and practices of virtually every activist political group in the country. These include not only such violence-prone organizations as the Minutemen and the Revolutionary Action Movement (RAM), but such non-violent groups as the Southern Christian Leadership Conference, Clergy and Laymen United Against the War in Vietnam, the American Civil Liberties Union, Women Strike for Peace, and the National Association for the Advancement of Colored People.

The Army obtains most of its information about protest politics from the files of municipal and state police departments and of the FBI. In addition, its agents subscribe to hundreds of local and campus newspapers, monitor police and FBI radio broadcasts, and, on occasion, conduct their own undercover operations. Military undercover agents have posed as press photographers covering anti-war demonstrations, as students on college campuses, and as "residents" of Resurrection City. They have even recruited civilians into their service—sometimes for pay but more often through appeals to patriotism. For example, when Columbia University gave its students the option of closing their academic records to routine inspec-

tion by government investigators, the 108th Military Intelligence Group in Manhattan quietly persuaded an employee of the Registrar's Office to disclose information from the closed files on the sly.

Typical of the hundreds of reports filed by Army agents each month are the following, taken from the unclassified intelligence summary for the week of March 18, 1968:

> PHILADELPHIA, PA: A. THE PHILADELPHIA CHAPTER OF THE WOMEN'S STRIKE FOR PEACE SPONSORED AN ANTI-DRAFT MEETING AT THE FIRST UNITARIAN CHURCH WHICH ATTRACTED AN AUDIENCE OF ABOUT 200 PERSONS. CONRAD LYNN, AN AUTHOR OF DRAFT EVASION LITERATURE, REPLACED YALE CHAPLAIN WILLIAM SLOANE COFFIN AS THE PRINCIPAL SPEAKER AT THE MEETING, FOLLOWING A QUESTION AND ANSWER PERIOD. ROBERT EDENBAUM OF THE CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS STATED THAT MANY PHILADELPHIA LAWYERS WERE ACCEPTING DRAFT EVASION CASES. THE MEETING ENDED WITHOUT INCIDENT.
>
> B. REV. ALBERT CLEAGE, JR., THE FOUNDER OF THE BLACK CHRISTIAN NATIONALIST MOVEMENT IN DETROIT, SPOKE TO AN ESTIMATED 100 PERSONS AT THE EMMANUEL METHODIST CHURCH. CLEAGE SPOKE ON THE TOPIC OF BLACK UNITY AND THE PROBLEMS OF THE GHETTO. THE MEETING WAS PEACEFUL AND POLICE REPORTED NO INCIDENTS.
>
> CHICAGO, ILL: APPROXIMATELY 300 MEMBERS OF VETERANS FOR PEACE AND WOMEN FOR PEACE HELD A PEACEFUL DEMONSTRATION AT THE MUSEUM OF SCIENCE AND INDUSTRY PROTESTING AN EXHIBIT BY THE US ARMY. SEVERAL DEMONSTRATORS ENTERED THE BUILDING IN SPITE OF WARNINGS BY MUSEUM OFFICIALS AND 6

WERE ARRESTED ON CHARGES OF DISORDERLY CONDUCT, RESISTING ARREST AND CRIMINAL TRESPASSING, FIVE OF THOSE ARRESTED WERE JUVENILES.

To assure prompt communication of these reports, the Army distributes them over a nationwide wire service. Completed in the fall of 1967, this teletype network gives every major troop command in the United States daily and weekly reports on virtually all political protests occurring anywhere in the nation.

The Army also periodically publishes an eight-by-ten-inch, glossy-cover paperback booklet known within intelligence circles as the "blacklist." The "blacklist" is an encyclopedia of profiles of people and organizations who, in the opinion of the Intelligence Command officials who compile it, might "cause trouble for the Army." Thus it is similar to less formal lists which the Department of Health, Education, and Welfare has maintained to exclude politically unpopular scientists from research contracts and consultant work.

Sometime in the near future the Army will link its teletype reporting system to a computerized data bank. This computer, to be installed at the Investigative Records Repository at Fort Holabird in Baltimore, eventually will be able to produce instant print-outs of information in 96 separate categories. The plan is to feed it both "incident reports" and "personality reports." The incident reports will relate to the Army's role in domestic disturbances and will describe such occurrences as bombings, mass violence, and arms thefts. The personality reports—to be extracted from the incident reports—will be used to supplement the Army's seven million individual security-clearance dossiers and to generate new files on the political activities of civilians wholly unassociated with the military.

In this respect, the Army's data bank promises to be unique. Unlike similar computers now in use at the FBI's National Crime Information Center in Washington and New York State's Identification and Intelligence System in Albany, it will not be restricted to the storage of case histories of persons arrested for (or convicted

of) crimes. Rather it will specialize in files devoted exclusively to descriptions of the lawful political activity of civilians. Thus an IBM card prepared many months ago for the future computer file of Arlo Tatum, executive secretary of the Central Committee of Conscientious Objectors, contains a single notation—that Mr. Tatum once delivered a speech at the University of Oklahoma on the legal rights of conscientious objectors.

Because the Investigative Records Repository is one of the federal government's main libraries for security clearance information, access to its personality files is not limited to Army officials. Other federal agencies now drawing on its memory banks include the FBI, the Secret Service, the Passport Office, the Central Intelligence Agency, the National Security Agency, the Civil Service Commission, the Atomic Energy Commission, the Defense Intelligency Agency, the Navy, and the Air Force. In short, the personality files are likely to be made available to any federal agency that issues security clearances, conducts investigations, or enforces laws.

Headquarters for the collection and coordination of this information is a wire-mesh "cage" located inside a gray metal warehouse at Fort Holabird. The official designation of the office is "CONUS Intelligence Branch, Operations IV, U.S. Army Intelligence Command." CONUS is the Army's acronym for Continental United States. Direction of this program is in the hands of Major General William H. Blakefield, head of the U.S. Army Intelligence Command at Fort Holabird. Established in 1965, the Command coordinates the work of a number of counterintelligence "groups" formerly assigned to the G-2 offices of the major stateside Armys. Accordingly, its principal function is not to collect intelligence but to protect the Army from espionage, sabotage, and subversion. Its main job is to investigate persons being considered for security clearances and to inspect military installations for adequate physical, wire-communications, and document security.

CONUS Intelligence Branch, also known as "Ops Four," is commanded by a major and run by a civilian. They supervise the work of about a dozen persons, who work

in shifts around the clock. Most are WAC typists who operate the teletype consoles that link the Intelligence Command to the Pentagon and to intelligence units around the country. It is here that reports from agents are received, sorted, and retransmitted. Because its staff is small and the volume of reports large, Ops Four rarely has the time to verify, edit, or interpret the reports before passing them on to "user organizations."

Daily recipients of this raw intelligence include all of the Army's military intelligence groups within the United States, riot-control units on stand-by alert, and the Army Operations Center at the Pentagon. The Operations Center, sometimes called the "domestic war room," is a green-carpeted suite of connecting offices, conference rooms, and cubicles from which Army and Defense Department officials dispatch and coordinate troops that deal with riots, earthquakes, and other disasters. Recipients of weekly CONUS intelligence summaries, also prepared at Fort Holabird, include not only those on the daily distribution, but such unlikely organizations as the Army Materiel Command, the Military District of Washington, the Air Defense Command, and Army headquarters in Europe, Alaska, Hawaii, and Panama.

What is perhaps most remarkable about this domestic intelligence network is its potential for growth. Uninhibited by Congressional or Presidential oversight, it has already expanded to the point where it in some ways rivals the FBI's older internal-security program. If the Army's fascination with the collection of domestic intelligence continues to grow as it has in the recent past, the Intelligence Command could use military funds to develop one of the largest domestic intelligence operations outside of the communist world. Before this happens, the American public and its elected representatives ought to demand a say in the development of this program.

The Army's Needs

Intentionally or not, the Army has gone far beyond the limits of its needs and authority in collecting domestic political information. It has created an activity which, by its existence alone, jeopardizes individual rights, demo-

cratic political processes, and even the national security it seeks to protect.

There is no question that the Army must have domestic intelligence. In order to assist civilian authorities, it needs maps and descriptions of potential riot or disaster areas, as well as early warning of incidents likely to provoke mass violence. Before trusting its employees or prospective employees with military secrets, it has to look into their past behavior for evidence of disloyalty or unsuitability. The Army also must investigate train wrecks, fires, and other disasters which may disrupt its lines of supply. And where ultra-militant groups seek to attack military installations, destroy files, or abuse soldiers, it has the right and obligation to keep informed about the groups' specific objectives, plans, and techniques.

The Army needs this kind of information so that it can fulfill long-established, legitimate responsibilities. But must it also distribute and store detailed reports on the political beliefs and actions of individuals and groups?

Officials of the Intelligence Command believe that they must. Without detailed knowledge of community "infrastructure," they argue, riot-control troops would not be able to enforce curfews or quell violence. To support this contention, they cite the usefulness of personality files and blacklists in breaking up guerrilla organizations in Malaya and South Vietnam. One early proponent of this view was the Army's Assistant Chief of Staff for Intelligence during 1967-1968, Major General William P. Yarborough. At the height of the Detroit riots of 1967 he instructed his staff in the domestic war room: "Men, get out your counterinsurgency manuals. We have an insurgency on our hands."

Of course, they did not. As one war-room officer who attempted to carry out the General's order later observed: "There we were, plotting power plants, radio stations, and armories on the situation maps when we should have been locating the liquor and color-television stores instead." A year later the National Advisory Commission on Civil Disorders reached a similar conclusion about the motives of ghetto rioters. "The urban disorders of the

summer of 1967," it declared unequivocally, "were not caused by, nor were they the consequence of, any organized plan or 'conspiracy.'" After reviewing all of the federal government's intelligence reports on 23 riots, it found "no evidence that all or any of the disorders or the incidents that led to them were planned or directed by any organizations or groups, international, national, or local."

Intensive investigations subsequently conducted by local police departments, grand juries, city and state committees, and private organizations have concurred. One of the more recent, a study of 1968 "urban guerrilla" activities by the Lemberg Center for the Study of Violence at Brandeis University, is typical. It found that press and police accounts of shooting incidents were grossly exaggerated. While acknowledging that there had been "a few shoot-outs with the police" some of which "may have been planned," the Center concluded that there was "no wave of uprisings and no set pattern of murderous conflict" from which one could predict organized violence even remotely resembling guerrilla warfare.

But even if there were grounds for making such a prediction, the Army's case for personality files and blacklists would remain weak. The purpose of these records, according to counter-insurgency manuals, is to facilitate the selective arrest of guerrillas and insurgents. However, within the United States the Army has no authority to round up suspects the moment civilians take up arms. The seizure of civilians on suspicion of conspiring or attempting to overthrow the government by unlawful means or of inciting people to crime is, and continues to be, the responsibility of local and state police and of the FBI. The President may order Army units to help state or federalized National Guard troops keep the peace or fight guerrillas, but the Army does not acquire authority to arrest civilians unless and until civilian law enforcement has broken down and a declaration of martial law puts all governmental authority in the area of conflict in the hands of the military. In that highly remote circumstance, the Intelligence Command might have some need for personality files and blacklists on criminally inclined, politically motivated civilians. By then, however, it certainly

would have full access to the more extensive and up-to-date files of the civilian agencies and thus would not have had to prepare its own.

The Army's need to keep its own dossiers on the politics of law-abiding citizens and groups makes even less sense. So long as there is a possibility that peaceful protests may get out of hand, some surveillance undoubtedly is in order. But must the Army conduct it? Are its agents and record keepers more competent than those of the FBI or of the police departments of the cities in which large demonstrations typically occur? Are the civilian law enforcement agencies so uncooperative that the Army must substantially duplicate their efforts?

More extraordinary still is why the Intelligence Command each week alerts military headquarters in Alaska, Hawaii, Panama, and Europe to stateside non-events like the following:

> MIAMI, FLA: A SPOKESMAN FOR THE SOUTHERN STUDENTS ORGANIZING COMMITTEE ANNOUNCED PLANS FOR A DEMONSTRATION TO BE HELD ON THE CAMPUS OF THE UNIVERSITY OF MIAMI IN THE MORNING, ACCORDING TO THE SPOKESMAN. A GROUP OF ANTI-WAR/DRAFT SUPPORTERS WILL PARTICIPATE IN THE DEMONSTRATION.
>
> PHILADELPHIA, PA: MEMBERS OF THE VIETNAM WEEK COMMITTEE COMPOSED LARGELY OF PROFESSORS AND STUDENTS OF THE UNIVERSITY OF PENNSYLVANIA, WILL CONDUCT A "SLEEP-IN" TO PROTEST THE SCHEDULED APPEARANCE OF DOW CHEMICAL COMPANY RECRUITERS ON CAMPUS. THE NEXT DAY, 19 MARCH, THE SAME ORGANIZATION WILL SPONSOR A PROTEST RALLY ON CAMPUS.

Perhaps the best answer to all of these questions is that much of the CONUS intelligence program serves no military need at all. But if this is so, then where does the Army get the authority to run it?

The Army's Authority

According to the Nixon Administration, authority for this kind of program comes from the Constitution. So, at least, the Justice Department claimed last June in a brief defending the FBI's failure to obtain search warrants before tapping telephone calls of what were then the "Chicago Eight." The Justice Department argued that Article Two of the Constitution authorizes the President and his agents to engage in whatever "intelligence-gathering operations he believes are necessary to protect the security of the nation" and that this authority "is not dependent upon any grant of legislative authority from Congress, but rather is an inherent power of the President, derived from the Constitution itself." Thus, the Department contended, "Congress cannot tell the President what means he may employ to obtain information he needs to determine the proper deployment of his forces."

If this is so, then Army agents do have the authority to undertake any surveillance that does not run afoul of the Constitution and the courts; indeed, they can investigate anything that is normally investigated by the federal government's civilian agencies. Moreover, they do not have to obey laws like the Omnibus Crime Control Act of 1968 which forbids most wiretapping and electronic eavesdropping without prior judicial authorization in the form of a warrant.

Fortunately, the "inherent powers doctrine," as this theory is called, has few supporters. The courts have never accepted the proposition that Congress is powerless to prescribe how the President shall exercise his executive powers. Indeed, in 1952, the Supreme Court rejected President Truman's claim to inherent power to seize the nation's steel mills to avert a strike which threatened the flow of equipment and supplies to American troops fighting in Korea. If there were no constitutional Presidential power to meet that emergency, it is unlikely that one exists to authorize the intelligence powers which the government claims today.

It is far more probable that the courts would endorse a conflicting view: that the Army's authority to collect

domestic intelligence is limited by, and can only be ininferred from, those laws which traditionally mark off the Army's reseponsibility for law enforcement from that of other agencies. These include not only the statutes which restrict the Army to a back-up function in times of riot, but the laws which assign surveillance of unlawful political activity within the United States to the FBI and the Secret Service. Other sources of the Army's authority include the Uniform Code of Military Justice, which permits investigation of unlawful political activity within the armed services, and those laws and federal-state agreements under which the Army governs many of its installations. These rules, and not the vague provisions of Article Two, are the legitimate sources of the military's domestic-intelligence powers.

Yet even if the current Administration's claim to an inherent constitutional power to watch lawful political activity were to be accepted by the courts, the surveillance itself probably would be forbidden by the Bill of Rights. The reason is the chilling effect which knowledge of surveillance has upon the willingness of citizens to exercise their freedoms of speech, press, and association, and their right to petition the government for redress of grievances.

Ten years ago the federal courts would not have accepted this contention. Then the courts were hesitant even to accept constitutional challenges to the government's collection of political information when the plaintiffs could prove that the investigators had no other purpose than to deter them from exercising their rights under the First Amendment. Recently, however, the courts have begun to accept the proposition that vague and overbroad laws and administrative actions are unconstitutional if they inhibit the exercise of those rights, regardless of whether that effect was intended.*

* Typical of this growing body of constitutional interpretation is the 1965 case of *Lamont* v. *Postmaster General*. There the Supreme Court struck down a federal statute which authorized the Post Office to suspend delivery of unsolicited mail which the government agents regarded as "Communist political propaganda" until the addressee returned a reply post card declaring that he wished to

The Program's Impact

Beyond the Army's need for the present CONUS intelligence program and its authority to pursue it lies the matter of its impact upon the public interest. In particular, there is its effect upon the rights of individuals, the democratic process, and the nation's security.

The impact which the program can have upon the exercise of political rights needs no further explication. The threat it poses to job rights and privacy, however, may not be so apparent.

Like the freedom from inhibitory surveillances, the job rights threatened are rights in the making. As yet no one has established a legal right to a job that requires a security clearance or to a security clearance essential to a job. Nevertheless, in recent years the courts have begun to recognize that those who already hold federal

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receive the mail. The Court, in a unanimous opinion, held that the effect of this practice, whatever the government's purpose, was to abridge freedom of speech by inhibiting the right to read.

Even more on point is the decision of a New Jersey Superior Court which last August declared most of that state's domestic intelligence system unconstitutional. In *Anderson* v. *Sills*, a suit filed by the America Civil Liberties Union on behalf of the Jersey City branch of the NAACP, the court held: "The secret files that would be maintained as a result of this intelligence system are inherently dangerous, and by their very existence tend to restrict those who would advocate . . . social and political change."

Had the New Jersey authorities been able to show a more urgent need for the records, the court might not have taken such a categorical position. But the police, like the Army, had cast their net so widely that it was bringing up huge quantities of information on wholly lawful political activities. Accordingly, the court brushed aside the state's claim to good intentions and found that the program had a chilling effect upon the exercise of First Amendment rights. It ordered all forms and files destroyed, "except where such information will be used to charge persons with specifically defined criminal conduct."

If people are likely to be deterred in the exercise of their rights by state intelligence systems, they undoubtedly will be inhibited by knowledge that reports of individual participation in public demonstrations are being made daily to the Pentagon, selected troop units, and an interagency data bank at Forth Holabird. Thus, even if the Army's collection of personality files and blacklists is not limited by legislation, it still may be unlawful.

jobs and security clearances have a right not to be deprived of either without just cause or, at the very least, without the rudiments of fairness. The impending marriage of the CONUS intelligence wire service to a computer could nullify even this protection, by filling security-clearance dossiers with unverified and potentially erroneous and irrelevant reports. These reports would then be used to determine who should, and should not, receive security clearances.

If the men and women who adjudicate security clearance were competent to evaluate such unreliable information, its inclusion in security files might be less cause for concern. Unfortunately, they are not. The most highly trained adjudicators—civilians employed by the stateside army commands—receive only nine days of job instruction on loyalty determinations at the Army Intelligence School. Moreover, this training does not even touch upon the subject of suitability, although almost 98 per cent of all clearances denied today are ostensibly rejected on that ground. The least trained adjudicators —intelligence officers assigned to field commands—receive exactly two classroom hours on loyalty and two on suitability while being trained to become investigators. Because of this extremely brief training, it is not unusual for an adjudicator to conclude that a person arrested in connection with a political protest is not suited for a security clearance, regardless of the circumstances of his arrest, the legality of his detention, or his innocence of the charges.

The adjudicators' lack of training is compounded by security regulations which permit—indeed, seem to require—the denial of clearances on less evidence than would support a magistrate's finding of "probable cause." In other words, it is not a question of whether reliable evidence indicates that the individual cannot be trusted with state secrets, but of whether the granting of the clearance would be "clearly consistent with the interests of national security." No one really knows what this ambiguous phrase means, but in practice it frequently is used to justify findings of guilt by association. For example, soldiers and civilian employees of the Army

with foreign-born spouses are virtually blocked from jobs requiring access to especially sensitive intelligence. Their association with a spouse who once "associated with foreigners" is taken as proof of their vulnerability to recruitment by foreign agents. Moreover, in nearly all other cases, adjudicators usually have to make their decisions without knowing the source of the evidence, without hearing the accused confront his accusers, or without hearing the accused defend himself with knowledge of their identity.

Given the tenuousness of the right to due process under these conditions, the influx of CONUS intelligence reports can make the system even more unjust than it is now. At the present time, little information on political activity is developed in the course of most background investigations. Army investigations, in particular, tend to be superficial; in some sections of the country shortages of personnel, caused by the war in Vietnam, have forced the Intelligence Command to abandon interviews of character references in favor of questionnaires-by-mail as its main means of inquiry. But if these questionnaires were to be supplemented by CONUS political reports, the number of clearances unjustly denied would skyrocket. These injustices would occur not only within the military; they would reverberate throughout all federal agencies with access to the Fort Holabird data bank.

The Army's domestic-intelligence program also imperils numerous expectations of privacy, some of which enjoy the status of legal rights. It does so by exposing Americans to governmental scrutiny, and the fear of scrutiny, to an extent to which they have never been exposed before. Even the Budget Bureau's ill-starred proposal to consolidate the federal government's statistical records into a National Data Center would not have brought together so much information about individual beliefs and actions.

The privacy of politically active citizens is especially threatened by the Army's practice of watching political protests, large and small, throughout the United States. To the potential protester, it is one thing to expect local press and police coverage; it is quite another to expect a

military surveillance which specializes in keeping permanent records of lawful political activity.

What effect awareness of the CONUS intelligence program will have on the vast majority of people who are *not* politically active is more difficult to predict. By itself, news that the Army is watching civilian politics is not likely to cause most people to worry personally about their privacy. But it would be one more increment in a growing pattern of governmental intrusiveness that could have a significant cumulative impact.

Such a pattern is now well established. Among the more widely publicized activities in recent years have been the CIA's surreptitious financing of student groups, labor unions, and foundations (despite the territorial limits of that agency's mandate), the Post Office's use of peepholes in restroom walls, and the Defense Department's misuse of lie detectors. Others include countless illegal wiretaps by the FBI, the Internal Revenue Service, and the Department of the Interior. More recently, the publication of confidential FBI wiretap information by *Life* and *Newsweek* which linked Jets' quarterback Joe Namath to Mafia figures suggests that the FBI has now assumed responsibility for enforcing professional football's code of conduct.

The cumulative impact of such abuses of power and privacy eventually must convince even the most anonymous of individuals that the United States is moving towards a society in which no one has control over what others know about him. Public awareness of the Army's activities cannot but hasten this conviction.

The unregulated growth of CONUS intelliegnce machinery also threatens the country's political health. It does so both by inhibiting political participation and by enhancing the potential clout of demagogues and others who would misuse security files for partisan or personal purposes.

The most immediate risk posed, of course, is to political participation. Once citizens come to fear that government agencies will misuse information concerning their political activities, their withdrawal from politics can be expected. This withdrawal can occur in a variety of

ways. Some people may decline to become involved in potentially controversial community organizations and projects. Others may go further and avoid all persons who support unpopular ideas or who criticize the government. Some may refuse to object to the abuse of government authority, especially when the abuse is committed in the name of national security. Others may even stop reading political publications, out of fear that the government might learn of their reading habits and disapprove. Indeed, an adjudicator of security clearances once asked me if she could lose her clearance if she allowed her daughter to subscribe to *The National Observer!*

Inhibitions generated by awareness of extensive domestic surveillance are likely to be strongest at the local level. This is where most citizens participate in politics if they become involved at all. The withdrawal can be expected to occur all across the political spectrum, although the strongest objections to surveillance will undoubtedly come from the left. Those most likely to be deterred, however, are not the extremists of the right or the left, whose sense of commitment runs deep, but the moderates, who normally hold the balance of power. Depletion of their ranks would, of course, strengthen the influence of the extremists, polarize debate, increase animosities, and decrease tolerance. As political positions rigidify, compromise and flexibility would become harder to achieve. And the capacity of government to renew itself and promote responsible progress would also suffer.

A less immediate but no less serious danger lies in the potential for misuse inherent in the Army's extensive files on individuals and groups. It is frightening to imagine what could happen if a demagogue in the Martin Dies-Joseph McCarthy tradition were to gain access to the computer the Army seeks now, or if an Otto Otepka in uniform were to leak a copy of the Intelligence Command's so-called "blacklist" to friends in Congress, or if a General Edwin Walker were to take charge of the Intelligence Command.

Such speculation assumes, of course, that the Army cannot guarantee the inviolability of its files. The as-

sumption, unfortunately, has some validity. Only last year, information from the Army's confidential service record on New Orleans District Attorney Jim Garrison was leaked to the press. Officers at the Investigative Records Repository at Fort Holabird (which functions as the Army's lending library for such files) suspected that the leak came from a civilian agency in Washington. They were helpless to do anything about it, however, because they had no system of records accountability by which they could fix responsibility. When asked why such a system did not exist, one officer told me: "We probably couldn't stop it [the leaks] if we tried."

Finally, the unregulated growth of domestic intelligence activity can have the paradoxical effect of undermining the very security it seeks to protect. It can do so in at least two ways. First, by increasing the "cost" of lawful political activity, it tends to force extremist groups to go underground, there to act out their us-versus-them view of politics by criminal means. Second, by intruding too closely into the lives of government employees (or prospective employees), it tends to inhibit them from applying for jobs requiring security clearances or from exercising initiative and imagination in those jobs. A good intelligence officer must be able to analyze and report accurately, and to do so he must feel free to immerse himself in the ideas and culture of the people he studies. A good scientist must have freedom to pursue his curiosities, or he is not likely to work for the government, which rarely pays as much as private industry. The direct consequence of programs which deny this freedom is to impair the quality of secret work and the caliber of the men who do it. As John Stuart Mill warned over a century ago:

> A state which dwarfs its men, in order that they may be more docile instruments in its hands, even for beneficial purposes, will find that with small men no great thing can really be accomplished. . . .

What Can Be Done?

If the Army has exceeded the limits of its needs and authority to establish a domestic intelligence program which endangers numerous public interests, what steps should be taken to curb its excesses?

An obvious first step is a court challenge of the Army's authority to possess information for which it has no substantial need. The main target of such a lawsuit should be the personality files and blacklists describing the *lawful* political activities of individuals and groups. A second target should be the collection and storage of information on individuals and groups suspected of participating in *unlawful* political activity—except where that information is essential to an "early warning" system, or where the persons involved are associated with the armed forces, or where the information is collected in the course of security investigations.

The lawsuit's argument should be twofold: (1) the Army has no substantial need for either kind of information, and (2) the very existence of the program inhibits the exercise of First Amendment rights. Such a suit should seek a court order declaring the Army's possession of both kinds of information to be unconstitutional; it should also ask the court to enjoin future collection and storage of such information and to direct the destruction of all existing personality files and blacklists.

While such a lawsuit stands a good chance of success, it could take years to litigate. Moreover, a favorable decision could be ignored or evaded for many more years. Thus, while the symbolic value of such a decision would more than justify the time and expense, an effective challenge of the intelligence program will require the development of legislative and administrative remedies as well.

Whoever attempts to devise these remedies should be prepared to undertake subtle analyses of competing interests and values, for while the excesses of the program must be permanently curbed, the Army's ability to fulfill its responsibilities must not be impaired.

Ideally, legislative and executive analyses should be based on the kinds of questions I have already asked:

What are the Army's real domestic intelligence needs? What authority does it have to initiate specific activities to meet those needs? What threats to liberty does each domestic intelligence effort pose?

The analysis should begin by demanding a justification for each alleged intelligence need in terms of the Army's authority to meet such a need and its purpose in trying to do so. Each need should then be weighed against the threats it may pose to the rights of individuals, to the vitality of the political process, and to the security of the nation. Where the risk is clear and the need doubtful, the Army should be denied authority to satisfy the need. Where the threat and the Army's need are both evident, less hazardous alternatives ought to be considered. In this circumstance, the capacity of politically responsible officials to control the alternatives should be weighed. Where reliable controls cannot be devised, the intelligence effort should not be authorized—even though the denial of authority may deprive the government of useful knowledge about the domestic political scene. If the imposition of these restraints poses a risk to internal security, then we must accept that risk as the price for individual liberties and a truly democratic political system.

The Congressional power of inquiry should be exercised first. Few Americans—including most members of Congress—know anything about the activities and plans of the *domestic* intelligence community. Many do not even realize that the growth of formal and informal ties among law-enforcement, intelligence, and security agencies has made it necessary to think in such terms.

For maximum effectiveness, Congress should hold open hearings not only to inform itself and the public, but to remind the intelligence community in general, and the Army in particular, that their authority to spy on civilian politics must be construed strictly, in accordance with such established principles as civilian control of the military, Presidential control of the bureaucracies, state and civilian primacy in law enforcement, compartmentalization and decentralization of intelligence duties, and obedience to law. Where it is not, corrective legislation should be promised.

A special effort should be made in the course of these hearings to inform the domestic intelligence community that Congress does not accept the Justice Department's position that "Congress cannot tell the President what means he may employ to obtain the information he needs."

Congress should also exercise its appropriations power so as to encourage major reforms in the Army's program. Specifically, it should block all funds for the planned computer unless and until the Army agrees to:

(1) Instruct its agents to limit their collection of CONUS intelligence to reports of incidents, except where the reports describe violations of the Uniform Code of Military Justice or of Army regulations. This would dry up the source of most blacklists and personality files.

(2) Forbid the Intelligence Command to convert incident reports into personality reports, except where they relate to criminal or deviant activity by persons subject to military law or employed by the military. Thus storage of information about named civilians unassociated with the armed forces would be doubly foreclosed, should such information be reported by mistake or as an essential element of an incident report.

(3) Establish effective technological, legal, and administrative safeguards against the abuse of individual rights in the process of collecting, reporting, storing, and disseminating domestic intelligence or personnel security information. For example, the Army should forbid its agents to infiltrate civilian political groups. (If it fails to do so, Congress should make such infiltration a federal crime for a local military commander to order his troops to serve in a sheriff's posse.) Computer storage systems also should be encouraged, since they can be equipped with more effective safeguards against misuse than is possible in document storage systems. However, these safeguards must be carefully designed, regularly tested, and reinforced by laws and regulations to deter those who might seek to circumvent them.

(4) Establish separate headquarters, preferably in separate cities, for the CONUS-intelligence and personnel-security staffs. So long as the two programs are located at the same headquarters (they now share the same room

and some of the same personnel), the danger of informal leakage of CONUS intelligence material to the adjudicators will remain high. Establishment of physically separate headquarters would be expensive, since it would probably require two separate communications and information storage systems. Separate storage systems, however, could be more safely computerized. Thus some of the additional expense might be recouped through increased efficiency.

(5) Request that the United States Judicial Conference or some similar body nominate a civilian advisory board to review and report annually on the sufficency of the Intelligence Command's procedures for safeguarding individual rights. Such a board could satisfy both the public's need for a regularized system of independent scrutiny and the Army's need for friendly critics capable of alerting it to the legal, moral, and political implications of its domestic intelligence program. How successful such a board can be is open to question; much depends upon how skillfully its members can be chosen so as to assure both military and public confidence in their capacity for balanced and constructive judgments.

(6) Improve the professional quality of Intelligence Command personnel and security-clearance adjudicators. In the final analysis, the Army must be the front-line defender against the dangerous consequences of its own actions. Thus, among other things, the Army should be encouraged to end the overcrowding and understaffing of its Intelligence School, to revise and expand the curriculum of its agents' course, and to transfer the training of security-clearance adjudicators to an accredited law school or the Practising Law Institute, a non-profit organization well known for its practical courses for lawyers and laymen on specialized legal subjects.

Needless to say, each of these reforms should be initiated by the President or the Army without waiting for Congressional encouragement. In addition, the President should appoint a panel of distinguished citizens, on the order of the Kerner Commission, to look into the conduct of all domestic intelligence activities. He should also ask an organization like the highly prestigious American

Law Institute to draft a new executive order, and code of regulations to govern the granting of security clearances.

Implementation of these reforms can do much to bring the Army's domestic intelligence practices in line with its legitimate responsibilities. But it is not enough to reform the Army. The Intelligence Command is only one member of a huge, informal community of domestic intelligence agencies. Other members of the community include not only the FBI, the Secret Service, the Air Force, and the Navy, but hundreds of state and municipal police departments. Some of the latter are surprisingly large. The New York City Police Department's Bureau of Special Services, for example, employs over 120 agents and has an annual budget in excess of $1 million.

Each of these organizations now shares with the Army the capacity to inhibit people in the exercise of their rights, even without trying. By collaborating, they could become a potent political force in their own right. Thus as the Army, the FBI, and the Justice Department strive to coordinate these agencies through the establishment of wire services, hot lines, and computerized data banks, it is essential that the American public and its representatives be equally energetic in the imposition of checks and balances. In particular, special efforts should be made to prevent needless concentrations of information. The United States may be able to survive the centralization of intelligence files without becoming totalitarian, but it most certainly cannot become totalitarian without centralized intelligence files. The checks must be designed with the most unscrupulous of administrators in mind. The fact that we may trust the current heads of our investigative agencies is no guarantee that these agencies will not one day come under the control of men for whom the investigatory power is a weapon to be wielded against political and personal foes.

EXHIBIT D

[New York Post, Tuesday, January 27, 1970]

ARMY ADMITS FILING DATA ON CIVILIANS

By MORTON KONDRACKE

WASHINGTON (CST)—The Army has acknowledged that it keeps files on civilians not connected with the military and on nonviolent organizations as part of its domestic intelligence-gathering operations.

The Pentagon issued carefully worded statements in response to questions submitted two weeks ago by reporters whose interest was aroused by a former intelligence officer's magazine article.

Former Army Capt. Christopher H. Pyle charged in the article, which appeared in the January issue of The Washington Monthly, that the Conus (for Continental U. S.) Intelligence Branch of the Army Intelligence Command "has gone far beyond the limits of [the Army's] needs and authority in collecting domestic political information."

Their Justification

The Army said it gathered political intelligence "in connection with army civil disturbance responsibilities." But it denied publishing a book that Pyle said was known in the intelligence community as "The Blacklist."

The Army however, conceded that it "does maintain an identification list sometimes with photos, of persons who have been active in past civil disturbances activity."

It said its information was obtained from "federal, state and local law enforcement agencies."

The Army acknowledged having a computerized data bank on potential civil disturbances, but denied that it extracted and kept separate computerized files on local political activists.

"Civil disturbance incident reports from field units are transmitted over a U. S. Army Intelligence Command-dedicated automatic voice network teletype system to the U. S. Army Intelligence Command headquarters at Fort Holabird, Md.," the Army statement said.

"Information on incidents by types and geographical location is placed into the data bank from key-punch cards for analysis of trends and identification of potential trouble spots.

"This is incident information only and does not include individual biographies or personality data."

The Army said it kept civil disturbance files separate from its files on the 7 million persons who have been investigated before receiving Army security clearance.

Pyle had charged that the two kinds of files were to be integrated to give the Army a vast library on civilians.

AFFIDAVIT/SPEISER

I, Lawrence Speiser, Esq., being of full age and duly sworn upon my oath, do depose and say:

1. I am the attorney for plaintiffs in the above-captioned cause of action.

2. I make this affidavit in support of plaintiffs' application for emergency relief, to wit, the granting of temporary restraining order, pending final hearing and determination of the request for permanent injunctive relief.

3. Plaintiffs seek this relief because of the threat posed by the following facts, the continuation of which would result in irreparable injury to plaintiffs and other organizations and person similarly situated:

A. On February 17, 1970, a complaint was filed by plaintiffs in the United States District Court for the District of Columbia requesting declaratory, injunctive and other appropriate relief against the surveillance, collection, maintenance, storage and distribution of information about the lawful and peaceful civilian political activities of plaintiffs and persons and organizations similarly situated within the United States by defendants, their agents, employees, and others acting in concert with them, which infringes upon the right to engage in lawful political activity protected by the First Amendment to the Constitution of the United States. Subsequent to the filing of this complaint, I received a letter dated February 25, 1970 from Mr. Robert E. Jordan, III, Army

General Counsel and Special Assistant for Civil Functions to defendant Stanley R. Resor, Secretary of the Army, identical to that received by more than thirty members of Congress, admitting that "there have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to go beyond the Army's mission requirements." Specifically, Mr. Jordan admitted that the U.S. Army Intelligence Command has published "an identification list which included the names and descriptions of all individuals who might be involved in civil disturbance situations," and has "operated a computer data bank" containing information about "potential incidents and individuals . . . not required to support potential Army civil disturbance mission." A copy of this letter is attached as Exhibit A to this affidavit in support of plaintiffs' order to show cause.

B. Subsequent to the filing of the complaint in the above-captioned cause of action, but prior to the admission of these unauthorized and constitutionally impermissible activities by the Army General Counsel, the defendants secretly ordered the immediate destruction of a variety of records, including records which this court must inspect if it is to grant effective relief to the plaintiffs and all persons and organizations similarly situated. Unless the defendants are immediately restrained by this court, plaintiffs believe that Army intelligence agents will destroy all documents by which this court can verify that the offending blacklists, computer tapes and cards, records, photographs, reports, microfilm, and other materials have, in fact, been destroyed. Plaintiffs base this belief upon the following information:

(1) Subsequent to the publication on January 9, 1970 of an article by Christopher H. Pyle, former Captain in Army Intelligence, entitled "CONUS Intelligence: The Army Watches Civilian Politics" in the January, 1970 issue of *The Washington Monthly*, defendants have evaded or ignored most legitimate press and Congressional inquiries. Except for a short period in mid-January, 1970 when the Pentagon Office of Public Information admitted use by the Army of 1,000 plainclothes agents, a

teletype network, and undercover operations to collect information on lawful civilian political activity,* the defendants have evaded legitimate inquiry, as to the scope of their civilian intelligence network. See speech by Senator Sam Ervin before the United States Senate on March 2, 1970, attached hereto as Appendix C, and letter from Senator Ervin to Secretary of the Army, Stanley M. Resor on February 27, 1970, attached hereto as Appendix D. At the same time, however, they secretly issue orders to destroy the Blacklist maintained by the Intelligence Command for destruction and to discontinue the computerized domestic intelligence data bank maintained at Ford Holabird, Maryland. See letter to Lawrence Speiser from Robert E. Jordan, III, attached hereto as Appendix A.

(2) Defendants did not officially reply to Congressional inquiries until after Representative Cornelius Gallagher (D. N.J.) threatened to convene the Special Subcommittee on Invasion of Privacy to inquire into the Army's domestic intelligence activities. See News Release from Congressman Gallagher attached hereto as Appendix E. Inquiries directed to defendant Resor from Senator Sam Ervin (D. N.C.) and Senator Abraham Ribicoff (D. Conn.), attached hereto as Appendices F and G respectively were not officially replied to until Feberuary 25, 1970 when Robert E. Jordan, III, Army General Counsel, replied in the aforementioned letter, attached as Appendix A to this Affidavit. The bulk of Mr. Jordan's letter was not responsive to the questions posed by these members of Congress, particularly as to question 16 posed by Senator Ervin (Exhibit F) requesting information describing all data banks maintained by the Department of the Army on private citizens. Thus, defendants are believe to have concealed from lawful inquiry the existence of:

(a) a large microfilm data bank indexed by computer and maintained by the Counterintelligence Analysis Division (CIA) of the Office of the Army Assistant Chief of Staff for Intelligence;

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* See New York Times story, Tuesday, January 27, 1970, attached hereto as Exhibit B.

(b) a second computerized domestic intelligence data bank maintained by the Continental Army Command at Fort Monroe, Virginia:

(c) regional data banks maintained by the G-2s of the First, Third, Fourth, Fifth and Sixth Armies, and the Military District of Washington;

(d) regional data banks maintained by the 108th, 109th, 111th, 112th, 113th, 115th, 116th, and 902nd Military Intelligence Groups and the 710th Military Intelligence Detachment; and

(e) cards and documents stored at the U.S. Army Intelligence Command's Headquarters from which the computerized data bank was organized and made operable.

(3) In addition, defendants have refused to reveal to the press or to members of Congress the existence of a second and larger blacklist believed to be published by the Counter-intelligence Analysis Division of the Office of the Assistant Chief of Staff for Intelligence, a two-volume, yellow covered, looseleaf publication entitled *Counterintelligence Research Project: Organizations and Cities of Interest and Individuals of Interest*, which describes numerous individuals and organizations unassociated with either the Armed Forces or with domestic disturbances.

C. Upon acknowledgement by the defendants that data banks existed which contained information about the lawful political activity of civilian persons and organizations contained in the letter from Robert E. Jordan, III, Army General Counsel, (Exhibit A), it was admitted that several of these computerized intelligence gathering operations would continue in existence despite the decision made to withdraw and destroy the identification list. Further, although Mr. Jordan states that the civil disturbance information bank has been "discontinued" there is no indication of the disposition made of the information contained in these discontinued data banks, leaving it possible for such data to be re-assembled in one or more of the remaining data banks still in operation. See, news story, "Fort Sam File Watches Civilians," San Antonio, Texas *Express and News*, Sunday, March 1, 1970, attached hereto as Appendix H; "Army Still Holds on to Its Civilian Dossiers," San

Francisco *Examiner, Saturday,* February 28, 1970, attached hereto as Appendix I.

D. On Febr ary 27, 1970, Senator Sam Ervin wrote again to defendant Resor requesting further information about Army Intelligence data banks and other intelligence gathering operations relating to lawful civilian political activity because of his concern about "unjustified interference by the Army into domestic political activities." (Appendix D) In a statement delivered to the United States Senate on Monday, March 2, 1970, Senator Ervin pointed out the serious constitutional defects inherent in the present Army Intelligence system which engages in the surveillance, reporting and storage of information relating to individuals and organizations engaged in lawful civilian political activity protected by the First Amendment to the United States Constitution, and indicated his concern that there might be "other files and data banks on civilian politics maintained in the Pentagon and elsewhere about the country under the authority of the Army Intelligence Groups." In addition to these concerns, Senator Ervin expressed concern over the lack of information as to when and how the data system mentioned in Mr. Jordan's letter was discontinued or destroyed, particularly where the issue involved is constitutionally impermissible survillance of lawful, peaceful civilian political activities by plaintiffs and other persons and organizations similarly situated.

4. Plaintiffs share the concern expressed by Senator Ervin. The effect of defendants activities pursuant to the collection, maintenance and distribution of information relating to lawful civilian political activity will be to intimidate plaintiffs and others similarly situated and deter them from exercising their rights of political expression, protest and dissent from governmental policies protected by the First Amendment by invading their privacy, and by posing the fear of loss of employment, reputation, or unknown injuries which would result in the diminution of lawful protest activity protected by the First Amendment because of the possibility of becoming included in the widespread civilian data bank and intelligence network maintained by defendants. The addi-

tional publicity given to the admission by the Army that it maintains civilian dossiers and data banks increases this intimidation. The indication that some information has been withdrawn or discontinued without any assurance that it is not duplicated in another data bank provides no lessening of the irreparable nature of the injury suffered by plaintiffs and persons and organizations similarly situated. Because of the critical nature of First Amendment rights, this court has the power to grant the relief herein requested, to prevent irreparable injury pending final determination of the constitutionality of defendant's challenged intelligence network. In order that debate on public issues be uninhibited, robust and wide open, plaintiffs and other similarly situated must not be deterred in the exercise of First Amendment rights by governmental action which exceeds constitutional or statutory authority and places an impermissible restrain upon these rights. Granting the temporary relief requested herein by plaintiffs will allow this court to assure that these rights will receive the protection they deserve and will serve as an aid in final determination of the merits of the cause of action by ensuring that any disposition ordered to be made by this court will be in compliance with constitutional safeguards and without the danger of duplication of files, records, or other actions which might frustrate the constitutional purpose.

Subscribed and sworn to
before me this (day of March,
1970.

APPENDIX A TO SPEISER AFFIDAVIT

Mr. Lawrence Speiser
Director
Washington Office
American Civil Liberties Union
Suite 501
1424 16th Street, N.W.
Washington, D.C. 20036

26 Feb 1970

Dear Larry:

This is in response to your letter concerning an article which appeared in the *Washington Monthly* entitled "CONUS Intelligence: The Army Watching Civilian Politics" by former Army Captain, Christopher Pyle.

The allegations made by Mr. Pyle were viewed with great concern by both the civilian and the military leadership of the Army. Both have always, over the generations, been keenly sensitive to the long-standing American tradition separating the military from involvement in domestic politics, and both are constantly alert to ensure that Army actions as well as policies are in keeping with the traditional limitations upon our armed forces. Ever since the unfortunate necessity arose, several years ago, for military forces to be prepared for civil disturbance operations when directed by the President, there has been a special sensitivity to the immediacy of this problem.

Our continuing goal has been to maintain suitable limits to Army intelligence involvement in the civilian sector, and toward this end our policies and practices have been undergoing periodic examination. The main charge of the article, and indeed its title, hold that the Army deliberately seeks the opposite, by widespread aggresive, covert collection of intelligence about people who "might make trouble for the Army." This charge is false. The Army's domestic intelligence activity has been to a small degree in the civil sector, but only to focus upon civil disorder, and the Army has long been pressing

to have civilian governmental agencies meet even these intelligence needs.

The military security functions of the Army in the United States are conducted by the U.S. Army Intelligence Command, Fort Holabird, Maryland. This Command reports directly to the Chief of Staff of the Army and is closely supervised for him by the Assistant Chief of Staff for Intelligence. The Command employs seven subordinate organizations, military intelligence groups, located throughout the United States in support of its military security functions. These groups, employing approximately 1000 agents, support the principal missions assigned to the Intelligence Command by the Department of the Army.

The principal activity of the U.S. Army Intelligence Command is to conduct security investigations to determine whether uniformed members of the Army, civilian employees and contractors' employees should be granted access to classified information. This activity and allied activity relating to security matters account for 94% of the time of Intelligence Command field personnel, and will consume a higher percentage in the future because of reduction in civil disturbance activities.

To avoid duplication of effort and to give investigators the benefit of prior work, a central filing system of Army investigations is necessary. The U.S. Army Investigative Records Repository, run by the Intelligence Command, has approximately 7 million files relating principally to security, loyalty or criminal investigations of former and present members of the Army, civilian employees and contractor personnel. When security or criminal investigations are completed the entire report is forwarded to the Records Repository at Fort Holabird for filing. The use of these files is limited by Regulation to specifically authorized Executive Branch agencies. No computer has been installed in the Investigative Records Repository; none has been or is planned to be installed since the cost in manpower and time to convert the Repository files to a computer bank would be prohibitive.

The Repository does have an automatic retriever system for some of the files; these files, placed in boxes, can be mechanically retrieved on a trolley system in order to save time in searching for files.

In order that investigative efforts in the security field would not be duplicated, Secretary of Defense McNamara directed on 27 May 1965 that a central index of all security investigations conducted by Department of Defense agencies be established. Accordingly, the Defense Central Index of Investigations was established at Fort Holabird. Data included in this Index is limited only to the identification of an individual, the type of investigation conducted, date of completion, and the location of the investigation (for example, Army investigations are filed in the Investigative Records Repository). The data is placed on manually key punched cards which are then alphabetically filed. A sample card is attached. At present, these cards must be manually searched. A plan to install a computer at the Central Index has been approved. Information on the key punched cards will be placed in the computer; the purpose of this computer will be to rapidly identify and indicate the location of files needed in security investigations. The computer will contain only the information shown on the sample card, which does not reflect the existence of any personal information of any kind, derogatory or otherwise. The present system and the planned computer are not and will not be tied in with any form of computer data banks. There is no plan to use the Central Index in any other fashion.

The U.S. Army Intelligence Command also has missions relating to the collection of information that may be needed by civilian planners and Army commanders in the event Federal troops are directed to act by the President. As you know, the Army has certain obligations under the Constitution and the laws to act at the direction of the President to deal with civil disturbances beyond the capability of local and state authorities to control. Army intelligence activities in the field of civil disturbances are directed primarily at ascertaining information needed to prepare appropriate levels of alert

for military forces and needed by military commanders if they are directed to act. This limited field of interest removes from legitimate concern of the Army minor forms of disturbances and lawful activities not likely to lead to major disturbance involving use of Federal resources.

Intelligence personnel obtain this limited civil disturbance-related information primarily from the FBI and state and local police agencies. When this information is collected in the field, it is reported usually by teletype to the U.S. Army Intelligence Command. The Director of Investigations, U.S. Army Intelligence Command, is responsible for collecting the information, storing it, and forwarding it, as necessary, to appropriate officials in the Department of Defense. The teletype is not linked to any computer, nor has there ever been a plan to do this.

The collection of civil disturbance-related information by the Army increased after the disturbance in Detroit in 1967. However, the Intelligence Command was not and has never been reinforced with additional personnel to accomplish the civil disturbance missions assigned to them at that time. Since this was a new area for the Army, an appropriate level of action necessary to accomplish the Army's mission had to be evolved. This area has been a subject of constant attention and refinement in order to narrow the Armys actions to only those which are absolutely necessary. There have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to be beyond the Army's mission rquirements. For example, the Intelligence Command published from 14 May 1968 to 24 February 1969, an identification list which included the names and descriptions of individuals who might be involved in civil disturbance situations. All copies of the identification list have been ordered withdrawn and destroyed. The Army's present policy is that reporting of civil disturbance information is limited to incidents which may be beyond the capability of local and state authorities to control and may require the deployment of Federal troops.

In the past, the Director of Investigations at the Intelligence Command has operated a computer data bank for storage and retrieval of civil disturbance information. This data bank, which included information about potential incidents and individuals involved in potential civil disturbance incidents, was though useful in that it permitted the rapid retrieval of related information for predicting trends and possible reactions. The civil disturbance data bank was discontinued since, after study, it was determined that the data bank was not required to support potential Army civil disturbance missions.

Thus the Army does not currently maintain, and has ordered the destruction of, the identification list referred to above. No computer data bank of civil disturbance information is being maintained, and directives provide that no such system can be initiated without the approval of the Chief of Staff and the Secretary of the Army.

I hope that the information set out above will satisfy your concerns.

Sincerely,

/s/ Robert Jordan
ROBERT E. JORDAN, III
General Counsel

Attachment
As stated

SAMPLE CARD

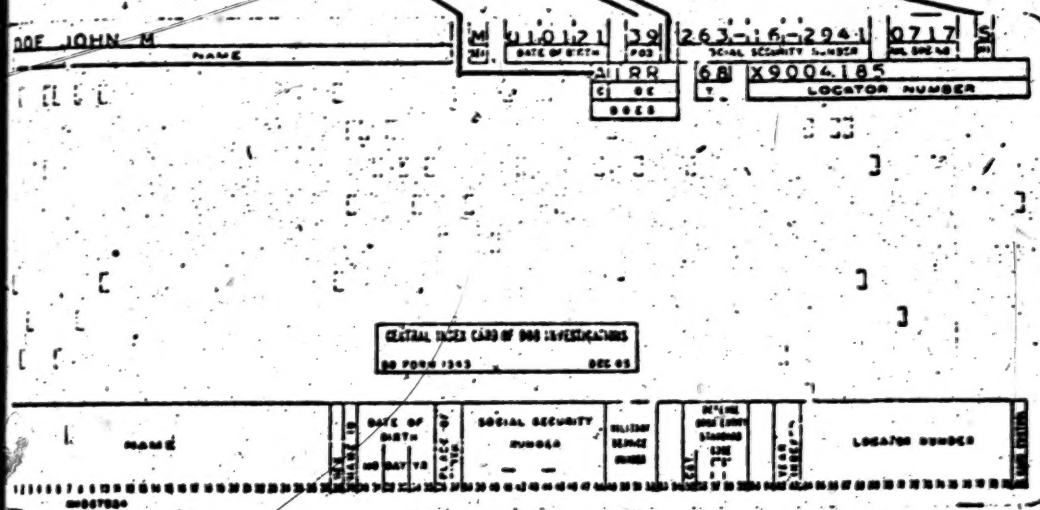
DEFENSE CENTRAL INDEX OF INVESTIGATIONS

DOD Component (Army file)

Place of Birth (By state code)

Location of File (Investigative Records Repository

Type of Investigation (Subject of investigation)



The holes punched on the card preserve in punched form only the information which is also type-printed on the card.

APPENDIX C TO SPEISER AFFIDAVIT

Speech by Senator Sam J. Ervin, Jr.
March 2, 1970

PRIVACY AND ARMY DATA BANKS: CONSTITUTIONAL RIGHTS AND MILITARY WRONGS

Last month, as part of the Constitutional Rights Subcommittee study of privacy, we addressed inquiries to the Army Department and other agencies asking about the amount and kinds of personal information they have on people, where it comes from, whether or not it is in computers, who uses it and if the individual has a chance to review and reply to it.

Our purpose in doing this is to determine whether or not Federal data banks are being developed in accordance with respect for Constitutional standards of privacy and due process of law for the individual citizen. Another purpose is to help Congress ascertain the need for comprehensive legislation to govern all data banks the government operates on individuals.

I have received a reply to our inquiry from the Army Department which provides a remarkable demonstration of the need not only for new laws but for a new agency to regulate data banks and protect individual privacy and constitutional rights where government records are concerned.

In response to many complaints, we asked the Secretary of the Army particularly to explain reports of information filed at Fort Holabird on the personalities, the political, economic, and social beliefs on the lawful community activities of American citizens. We asked him also to describe in detail the collection and storage of intelligence and other investigative data on private individuals at the Investigative Records Repository and at other Army data centers. In addition, we asked for citations and copies of the statutory and administrative authority on which he relies for this data collection.

The Army Department, in a partial response to my letter, has corroborated the complaints received by Congress. According to their letter, the Army Intelligence Command maintained, and, indeed, still does maintain, information on civilians. In one location alone, the Army Investigative Records Repository, 7 million files are kept on former and present members of the Army, civilian employees and contractor personnel. These relate principally to security, loyalty, and criminal investigations. However, beyond saying that use of these files is "limited by regulation to specifically authorized Executive agencies" and that no computerization has occurred or is planned, no further light is shed on the overall purpose and management of these files. Nor are any statutes and regulations cited. I hope this information will be forthcoming in the final reply.

The Army Intelligence Command keeps still other files on individuals. These they justify under their "Missions relating to the collection of information that may be needed by civilian planners and Army commanders in the event Federal troops are directed to act by the President." These activities by the Army were increased reportedly after the Detroit disturbance in 1967.

In furtherance of this non-military mission, the Army stockpiled an amazing arsenal of weapons. First, in the best tradition of military precision, efficiency and economy, the Army Intelligence officials admittedly set up a computer data bank with information about "potential incidents and individuals involved in potential civil disturbance incidents." They confess that they though this would be useful in "predicting trends and possible reactions."

Another weapon they developed wa a list which included the "names and descriptions of individuals who might be involved in civil disturbance situations."

The business of the Army in such situations is to know about the conditions of highways, bridges, and facilities. It is not to predict trends and reactions by keeping track of the thoughts and actions of Americans exercising First Amendment freedoms.

If ever there were a case of military overkill, this is it.

Regardless of the imaginary military objective, the Chief casualty of this overkill is the Constitution of the United States, which every military officer and every appointed official has taken an oath to defend.

It is to the lasting credit of Secretary of the Army Resor and General Counsel Robert Jordan that after the inherent dangers to constitutional liberties in this program were pointed out to them, some immediate action was inititaed.

Mr. Jordan reports that the identification list has been withdrawn and destroyed, and one computer data bank has been discontinued. He states that no computer data bank is now being maintained for storing such information about civilian politics, and that directives provide that no such system can be initiated without the approval of the Chief of Staff and the Secretary of the Army.

While the Army's response is commendable, it raises more questions than it answers, and it leaves a great many of the old questions unanswered.

Since I view this as an interim response to the Subcommittee's inquiry, I shall await with interest the Army's final and comprehensive reply to our questions.

We should like to know when and how that particular computer data bank was discontinued and whether that information is duplicated in other Army files and microfilms. The essential factor here was not necessarily the computerization of the files, but the fact of the Army surveillance of citizens. We should still like to know about other files and data banks on civilian politics maintained in the Pentagon and elsewhere about the country under the authority of the Army Intelligence Groups.

We should like to know how many copies of the identification list were issued and how frequently? In addition, we still require copies of directives and regulations governing the current information collected and stored under the new policy for "civil disturbance" as well as for other purposes at Fort Holabird and elsewhere by the Army.

I have informed the Secretary of the Army of our continued interest in receiving the answers to our ques-

tions and in receiving a copy of the new directive concerning establishment of new computerized data systems. I hope this marks the beginning of a trend and that more directives will be forthcoming concerning access to review and use of the old information they already have on hand.

Although I have little, if anything, in common with the attitudes and view of some of the persons who are probably in the Army files, the very existence of such unconstitutional surveillance by the Army is, I believe, destructive of our form of government.

The Army Department states that it "has long been pressing to have civilian governmental agencies meet needs of domestic intelligence." Obviously, and perhaps fortunately, someone in those agencies is vetoing the idea.

If the President of the United States determines that new forms of intelligence gathering activities are necessary to enforce the laws, let him so inform the Congress, and let Congress assign the responsibilities to an appropriate civilian agency.

I suggest the Army regroup and redefine their strategic objectives, lower their sights, and re-identify their enemy. Under our Constitution that enemy is not the American citizen.

APPENDIX D TO SPEISER AFFIDAVIT

U.S. SENATE
SUBCOMMITTEE ON
CONSTITUTIONAL RIGHTS

Washington, D. C., February 27, 1970.

Hon. Stanley R. Resor,
Secretary of the Army,
The Pentagon,
Washington, D. C.

DEAR MR. SECRETARY: Thank you for your interim reply to the Subcommittee's inquiry of January 22, 1970, in connection with our study of privacy and data systems.

I wish to commend you and the General Counsel of the Army for the prompt and effective action you have taken to reduce the Army Department's involvement in domestic intelligence work, I was gratified to learn that you have discontinued the computer data bank which was maintained on "potential incidents and individuals involved in potential civil disturbance incidents." Furthermore, the fact that you have ordered the withdrawal and destruction of a list of people who might be involved in civil disturbances is also laudable, and will be reassuring to those in Congress concerned with constitutional rights.

My inquiry of January 22, as you know, was not limited to information collected for possible civil disturbances, nor was it confined to files kept at Fort Holabird.

Since Mr. Jordan's letter deals only with one Fort Holabird computer data bank, and does not refer to other similar civil disturbance data banks and data systems not necessarily computerized, which are reportedly maintained by the Army in the Pentagon and in the various Intelligence Groups, I hope that your final

reply will complete your response to our inquiry, especially to Question 16.

His letter does not, furthermore, deal with the questions raised concerning the information which he indicates is currently being maintained under the new policies. In addition, it does not answer our inquiries concerning other information kept on file about civilians.

With your final reply, I hope that you will comply with the Subcommittee's request for the pertinent regulations, statutes, directives, and other authority to which Mr. Jordan generally refers.

Since Mr. Jordan states that the Army has urged that other civilian agencies take over the task of domestic intelligence, we should be interested in knowing what specific recommendations have been made in this matter.

While the Department is to be commended for the prompt action to remedy, at least partially, this unjustified interference by the Army into domestic political activities, this does not explain how the Army was permitted to engage in such activities in the first place. The preservation of our civil liberties cannot depend on the lucky discovery of illegal programs. Clearly, in our government of laws, no such activity should be undertaken secretly, as was this, nor without clear statutory and constitutional authorization from Congress.

With all kind wishes, I am,

Sincerely yours,

SAM J. ERVIN, JR.
Chairman.

APPENDIX E TO SPEISER AFFIDAVIT

Dear Mr. Secretary: Jan. 26, 1970

The most recent issue of *The Washington Monthly* contains allegations which are very disturbing to me. In an article entitled "CONUS Intelligence: The Army Watches Civilian Politics," by Christopher Pyle, it is charged that the Department of the Army is collecting dossiers on individuals who engage in legal protests around the United States or who are connected with activist groups. Among the organizations whose members are mentioned for inclusion in the Army's intelligence reports are the National Association for the Advancement of Colored People and the American Civil Liberties Union.

While many questions come to my mind about the Department of the Army maintaining such surveillance over the domestic affairs of our Nation, a source of particular concern is that this information is to be stored in, and disseminated from, a computerized data bank at Fort Holabird, Baltimore, Maryland. It appears that, should Mr. Pyle's article be totally factual, a nationwide data bank of extremely sensitive personality reports is being constructed at the Investigative Records Repository.

As Chairman of the Special Subcommittee on Invasion of Privacy, I conducted hearings on a suggested National Data Bank advanced by the Bureau of the Budget in 1966. Based upon my investigation, the Committee on Government Operations issued in August 1968 "Privacy and the National Data Bank Concept." As part of my continuing studies on that issue, I received a letter dated March 21, 1968, from the then Director of the Bureau of the Budget, Charles Zwick. The letter contained the following relevant comments:

> ". . . we will prepare a specific concrete plan which could be exposed to the critical review of a group representing the broad variety of interests in the matter. Only after that would we consider that we have a proposal for appropriate consideration by the Congress."

On January 15, 1970, Lawrence Speiser, Director of the Washington Office of the American Civil Liberties Union wrote to you on the issue of the computerized Investigative Records Repository. He referred to my agreement with the Bureau of the Budget and to the intense Congressional concern over computerized data banks:

> "Their concern was responsible for the review and reconsideration of plans for a national federal data center and the promise by the Bureau of the Budget that none would be created without prior Congressional approval. Also it was clearly understood That under no circumstances would raw investigative data ever be fed into any computer bank."

Mr. Speiser accurately reflects the understandings reached with the Bureau of the Budget about a National Data Bank. Yet, it would seem from Mr. Pyle's article that precisely the proscribed information is to be fed into what if it is not formally a National Data Bank, is, at the very least, a nationwide data bank.

I clearly recognize, Mr. Secretary, the necessity for some data to be at the disposal of the Department of the Army in order to meet its responsibilities to quell civil disorders and I would not quarrel with an attempt to isolate trouble spots around the country. However, I am deeply concerned about the implications of collecting dossiers on Americans who are pursuing constitutionally protected activities, especially when they are to be inextricably embedded in immediately available form in a computerized data system. I would, therefore, ask the following questions:

1. Is the article sufficiently substantive to describe the current data collection procedure and the eventual construction of a computerized data bank at Fort Holabird? If it is, have you discussed the National Data implications with the Bureau of the Budget or with any group concerned about the constitutional questions such a compilation and centralization of data would raise?

2. Is there any plan for the individual to be informed of the range of information on him in the bank and does

he have the possibility to file mitigating or ameliorating rebuttals? I note that Mr. Pyle indicates that at least some of the information in the Investigative Records Repository is based on newspapers stories and conjunct information which has not been subjected to judicial review for its accuracy or completeness.

3. Mr. Pyle states "The personality files are likely to be made available to any federal agency that issues security clearances, conducts investigations, or enforces laws." Should that sentence reflect current operating procedure, may I have your assurance that you are taking steps to make such interagency transfer unlikely, if not impossible?

4. What is the specific source of funds under which the Department of the Army is constructing this alleged nationwide data bank? How is it connected to the mission of the Department of the Army to collect and store such sensitive information in a computerized data bank which, according to Mr. Pyle ". . . will specialize in files devoted exclusively to descriptions of the *lawful* political activity of civilians." (Emphasis in Original)

It is entirely possible, Mr. Secretary, that Mr. Pyle's article is an inflated estimate of what is being collected, what will be contained in the nationwide computerized information system, and who will have access. I would hope that you could report to me that that is true, for it would represent an unconscionable and unconstitutional threat to the privacy and spontaneity of Americans if *The Washington Monthly* has accurately described the Investigative Records Repository at Fort Holabird. I anticipate your prompt reply to the questions contained in this letter.

With continued best wishes,

Sincerely,

CORNELIUS E. GALLAGHER, M.C.

cc: Hon. Robert Mayo, Director, Bureau of the Budget

APPENDIX F TO SPEISER AFFIDAVIT

Hon. Stanley R. Resor, Jan. 22, 1970
Secretary of the Army,
Washington, D.C.

Dear Mr. Secreatry: In connection with our study of computers, privacy and constitutional rights, the Constitutional Rights Subcommittee is conducting a survey of the development and maintenance of data banks by Federal departments and agencies.

One of our purposes is to determine whether or not such data systems are bing developed in accordance with constitutional standards of privacy and due process of law for the individual citizens involved. Another purpose is to help Congress ascertain the need for comprehensive legislation to govern all computerized data banks on individuals.

Our attention has been particularly directed to reports of the development and expansion of data banks at Fort Holabird, containing information on the personalities, on the political, economic and social beliefs and on the lawful community activities of American citizens.

To assist the Subcommittee in its study, we should appreciate your explaining for us (1) the present situation concerning collection and storage of Army intelligence and other investigative data on private individuals, particularly at the Investigative Records Repository, but also at other data centers operated by the Army; and (2) future plans for expanding and further computerizing the present system.

Specifically, we should receive responses to the following questions:

1. Under what statutory and administrative authority was the Investigative Records Repository established, and for what purpose? What is the relationship of this activity to the responsibilities of the Armed Forces? Please supply copies of pertinent statutes, regulations and memoranda.

2. Is all military intelligence data on individuals filed in this center? Is it computerized?

3. How many subject individuals are presently recorded in the system at the Records Center?

4. What categories of information about individuals are contained in this data bank? Are there any published or unpublished regulations or instructions governing the type of information appropriate for the files, how is it to be gathered, and how its accuracy is to be determined? If so, please supply copies.

5. Are there plans to extend the scope of these files in number and subject matter? If so, how would this specifically alter the existing data system?

6. Is the subject individual, or his representative, allowed to review the data on record about him, to supplement his file and to explain or rebut material he considers inaccurate?

7. What provisions are made deleting material found to be inaccurate or inappropriate, either spontaneously by the Army or on motion of the individual concerned?

8. What limitations are placed on access to the file or to information contained in it? What security procedures or devices are employed to prevent unauthorized access to the data file or improper use of the information? Who specifically has access to this data? For what reasons and on what authority is access granted?

9. What other agencies have access to these files? For what purposes? Under what restrictions?

10. Is a record maintained of the details of inspection or use of the file or data on an individual?

11. How is this information collected and by whom? Is it collected by investigators or from third parties? Is it solicited from the individual himself, or is it collected from other records?

12. Do you have published or unpublished regulations or guidelines concerning use and availability of these files? If so, please supply copies.

13. Do you have published or unpublished regulations or guidelines concerning the gathering, screening and accuracy of data in these files? If so, please supply copies.

14. To what extent are these files computerized? What are your plans for computerizing further?

15. The Subcommittee is interested in learning the truth about current reports that the Army plans to connect its intelligence teletype reporting system to a computerized data bank at the Investigative Record Repository. If so, what are your plans for safeguarding the accuracy of the data collected and its relevance to the area of your responsibility?

16. What other data banks are maintained or supported by the Department of the Army on private citizens? To the extent possible, please supply for each of these the information requested for the Fort Holabird data banks.

Enclosed is a *Congressional Record* excerpt describing the scope of the Subcommittee's interest in the government's use of data banks on individuals.

Your assistance in our study is deeply appreciated.

With all kind wishes, I am,

Sincerely yours,

SAM J. ERVIN, JR.
Chairman.

AFFIDAVIT OF THADDEUS R. BEAL
UNDER SECRETARY OF THE ARMY

I THADDEUS R. BEAL, being duly sworn, depose and state that I am the Under Secretary of the Army and have held this position since 8 March 1969. I am familiar with the complaint in the case of *Tatum* v. *Laird*, which has been filed in the District Court for the District of Columbia, and the activities of the Department of the Army complained of therein.

Pursuant to the authority set forth in Title 10, United States Code, sections 331, 332, 333 and 3012, Executive Order 10450, 27 April 1953, 3 CFR, 1949-1953, Comp., p. 936, and Department of Defense Directives 5210.7, 5210.8, 5210.9 and 3025.12 (8 June 1962, 32 CFR 187.1 *et seq* to .329) the intelligence activities of the Department of the Army within the Untied States relate pertinently to (1) personnel security investigations, in order to determine whether civilian and military employees of the Army and employees of Defense contractors can be granted access to classified information, (2) special investigations pertaining to loyalty and espionage matters, concerning civilian and military employees of the Army, and (3) the gathering of information concerning activities which may adversely affect the mission or security of the Army, or require the Army to deploy its troops to assist civilian authorities in restoring stability when so ordered by the President.

Completed investigative records are kept in a central file located at the U.S. Army Investigative Records Repository. Army Regulations require that the files in the Records Repository be carefully controlled and access to the files be limited to those with a strict "need-to-know." It is the firm policy of the Department of the Army that any adjudications based on these files will be made only after an entire investigative file has been reviewed. Accordingly, the files in the Records Repository are not summarized and are not computerized in any way.

In order to further assist in these investigations, the Department of the Army maintains, for the Department of Defense, the Defense Central Index of Investigations.

This Index, which will be computerized shortly, is designed to locate all security and criminal investigative files maintained by the military departments. This Index also does not contain any information indicating the nature or the conclusions of the investigations in question. The sole purpose of this Index is to locate files in order to reduce the time for investigations.

The Department of the Army has primary responsibility among the military services for planning for and rendering assistance to civil authorities in civil disturbances. 32 CFR Secton 501.1(b).

With respect to the employment of military resources in the event of civil disturbances the Department of the Army has been charged by the Department of Defense to, among other things, provide essential intelligence data to ensure that appropriate military authorities are prepared to render assistance to local civilian authorities when ordered to do so by the President under constitutional and statutory authority. The Army is also charged with keeping the Secretary of Defense informed of unusual military resource requirements (actual or potential) and other significant developments in connection with civil disturbance plans and operations. 32 CFR Section 187.6 (a)(8). In the performance of this intelligence mission the Department of the Army must be fully and currently informed on all matters relating to the potential involvement of Federal troops in civil disturbance matters.

Army intelligence activities in the field of civil disturbance are directed primarily at ascertaining information needed to prepare appropriate levels of alert for military forces and needed by military commanders if they are directed to act. The Army cannot simply wait until there is an actual requirement to deploy troops before information about a disturbance is collected. Considerable advance time is needed in order to place troops on alert, prepare troops to move, secure necessary aircraft, actually move troops, and have them available for deployment. Consideration must be given to having forces available for possible use in different locations with civil disturbances as well as in international operations. When a unit is placed in an alert posture and

required to be ready to depart its home station within a few hours, normal training must cease and troops must prepare for departure. Military officials must exercise care that troop units are not placed on alert too frequently, or for excessive periods of time.

The time needed to move troops to a civil disturbance area, coupled with the problems which arise whenever short alert times are necessary, require that the Department of the Army keep itself informed in advance as to potential situations where troops may be necessary. Accordingly, collection of information in advance of the time when federal troops are committed by the President is necessary. It is important to recognize that the Army is not concerned with minor disturbances or lawful activities not likely to lead to major disturbances where federal troops may be needed. It is also important to note that the overwhelming bulk of information received by the Army is collected from federal, state and local agencies.

In addition, the Department of the Army, as part of its civil disturbance mission, must be in a position to analyze information in order to prepare necessary civil disturbance plans. To this end, the Counterintelligence Analysis Division in the Office of the Assistant Chief of Staff for Intelligence, which is responsible for worldwide counterintelligence analysis, maintains and collects information from other federal agencies. For example, for planning purposes the Army must determine cities where there is a high potential for violence so that appropriate plans can be developed. It is the function of the Counterintelligence Analysis Division to answer questions of this nature and to this end information is collected from other Federal agencies.

As a result of a review of the intelligence activities of the United States Army it has been determined that certain records maintained by the Army were not useful and were not necessary in view of the Army's mission. These records include the identification lists which the plaintiffs have erroneously described as a "black list" and the computer data bank containing civil disturbance information developed by the United States Army Intelligence Command. Accordingly, all such records main-

tained by the United States Army Intelligence Command, or otherwise under Army control, have been destroyed. I have directed that one copy of the identification list and one print out of the bulk of the information in the data bank be retained as long as necessary in connection with the litigation in *Tatum* v. *Laird.*

Additionally, field commands initiate spot reports concerning imminent or existing incidents. These spot reports are routinely destroyed after 60 days. I have directed that one copy of all such reports now in existence, or hereafter reported, be similarly retained as long as is necessary in connection with the *Tatum* suit.

The Department of the Army is continuing to review its activities and may direct that other data be destroyed. In such an event, one copy of each item destroyed will also be retained so long as is required by the *Tatum* case.

Based upon my knowledge of the intelligence activities of the Department of the Army, any order which would bar or limit such activities, or change the custody of the department of the Army records or require that they be destroyed, or not be destroyed, would interfere with the accomplishment of the Army's mission and could endanger the national security or harm the public interest.

/s/ Thaddeus R. Beal
Under Secretary of the Army

MOTION TO DISMISS

Now come the defendants, by their undersigned attorneys, and respectfully move this Honorable Court to dismiss this action on the grounds that there exists no justiciable issue, case or controversy and no basis for the granting of equitable, declaratory or other relief; that plaintiffs' suit is in law and fact a suit against the United States to which the United States has not consented and is barred by the doctrine of sovereign immunity and is also barred by doctrine of separation of powers; and that the Court is without jurisdiction over the subject matter of this action.

In support of this Motion to Dismiss the Court's attention is respectfully invited to the attached Memorandum of Points and Authorities and to the affidavit of Thaddeus R. Beal, the Under Secretary of the Army dated March 19, 1970, which was filed in this Court on March 19, 1970, in support of defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction.

/s/ J. Walter Yeagley
Assistant Attorney General

/s/ Kevin T. Maroney
Attorney, Department of Justice

/s/ Benjamin C. Flannagan
Attorney, Department of Justice
Washington, D.C. 20530
RE 7-8200, Ext. 2333
Attorneys for Defendant

EXHIBIT A TO PLAINTIFFS' MEMORANDUM

February 2, 1970

Hon. Stanley R. Resor,
Secretary of the Army,
Washington, D.C.

Dear Mr. Secretary: I enclose a copy of an article from the January 1970 *Washington Monthly*, entitled "CONUS Intelligence: The Army Watches Civilian Politics." I would appreciate your letting me have the benefit of your comments on the article. In addition, I would appreciate your providing me with information in response to the following questions prompted by this article:

1. What is the legislative authority for domestic intelligence gathering activities by the Army involving political activities that are not directly related to military or civilian personnel matters;

2. How many people—military and civilian—work in the Army's domestic intelligence program?

3. What is the budget for FY 1970 and proposed for FY 1971 for domestic intelligence gathering, including military pay and allowances; What proportion of the budget is used for personnel investigations and similar intelligence work?

4. What is the justification for the Army to engage in surveillance of organizations or individuals involved in political protests?

5. What criteria are used in determining which activities to cover and report on?

6. How many meetings by civilian organizations were covered or reported on during the last year?

7. What, if any, arrangements exist between the Army and other government investigative agencies to prevent duplication of effort in keeping track of the activities of organizations under surveillance?

8. What periodic reports are filed concerning the activities of political protest groups? Please provide a copy of the latest report available of each type.

9. The article alleges that the Army publishes a booklet containing information on individuals and groups that might "cause trouble for the Army." Is there such a document; If so, please provide a copy of it and details on the distribution of it. Who has access to this information?

10. How many names of individuals and organizations does the Army currently have in its security files; Approximately how many were added in the last year that were not due to investigations for personnel purposes?

Sincerely yours, J. W. FULBRIGHT

APPENDIX F TO PLAINTIFFS' MEMORANDUM

DEPARTMENT OF THE ARMY
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D.C. 20310

March 20, 1970

Honorable Sam J. Ervin
Subcommittee on Constitutional Rights
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in further response to your letters about certain practices of Army intelligence and your Subcommittee's concern with privacy and data systems. The purpose of this letter is to answer the questions that you posed in your letters of 22 January and 27 February. While some of the information in this letter may repeat some of Mr. Jordan's comments to you, I have done this, where necessary, to help clarify the matter from the overall standpoint.

The present program governing access to classified information was established on 27 April 1953 in Executive Order 10450 (Encl 1). This Executive Order, and the programs developed by Federal agencies, recognizes the need for the Government to protect access to classified information. The Executive Order provides that the head of each Federal agency is responsible for establishing procedures governing security and sets out general standards to be applied. As a result, the Department of Defense has issued Department of Defense Directives 5210.8 (Encl 2) and 5210.7 (Encl 3); the Department of the Army, as well as the other Military Departments, has issued further implementing instructions.

The principal activity of the U.S. Army Intelligence Command is to conduct investigations to determine whether uniformed members of the Army, civilian employees and contractors' employees should be granted access to

classified information. In order to avoid duplication of effort and give investigators the benefit of prior work the U.S. Army Investigative Records Repository (USA IRR) was established on 17 August 1951 to serve as a central filing system for all Army investigations (Encl 4), and detailed instructions to field elements for centralizing files then located throughout the Army were issued on 18 January 1952 (Encl 5). You will note that these order provide that the USAIRR "is not an investigative agency and has no responsibility for the evaluation of information. . . ." This policy continues in effect today.

Since 1952 all Army security and criminal files have been centralized in the USAIRR. The USAIRR presently contains approximately 7 million files relating principally to security and criminal investigations of former and present members of the Army, civilian employees and contractors' employees. At present, the operating procedures and controls over the USAIRR are specified in Army Regulation 381-45 (Encl 6). There are no plans to expand either the scope of the subject matter of files in the USAIRR. As previously noted, no computer has been installed or is planned to be installed in the USAIRR.

The files maintained by the USAIRR relate to individuals within the Army's investigative jurisdiction; the other services maintain similar files. As noted in Mr. Jordan's letter to you, the Army operates, for the Department of Defense, the Defense Central Index of Investigations. This Index, designed to locate any security or criminal investigative file for any Defense agency, will be computerized shortly. As previously noted, the material in this Index is limited to identifying data such as name, date of birth, social security number, on individuals who have been the subjects of investigations and the location of the investigations.

It is estimated that approximately 1.1 million of the 1.9 million civilian and military employees of the Army require a security clearance in order to perform their jobs. When an individual is selected for or assigned to

a position requiring a security clearance, a request for an appropriate investigation is submitted, through channels, to the U.S. Army Intelligence Command. The Intelligence Command, depending upon the type of clearance sought will review the information submitted by the individual and direct military intelligence agents to conduct an appropriate investigation. This investigation, again depending upon the type of clearance requested, may consist of a check in the Defense Central Index of Investigations to see if other investigations have been conducted by DoD agencies, review of an existing file in the USA IRR, a check of local criminal records in areas where an individual has lived, interview with references, checks with former employees, etc. Each activity performed by an agent is reported to the Intelligence Command; the Intelligence Command is then responsible for resolving contradictory or conflicting reports through further investigation and checking out all undeveloped information. When the investigation is completed, the entire file is forwarded to the command which requested the investigation; that command (the clearance authority), and not the Intelligence Command is responsible for evaluating the investigation and determining whether a clearance will be granted.

When the clearance authority has completed action, the entire file is sent to the USAIRR. Accordingly, a standard personnel security file in the USAIRR will contain the papers submitted by the individual, reports submitted by the agents concerning their investigation, and copies of the action taken by the clearance authority in determining whether a clearance should be granted. I have attached copies of the types of documents which may be included in the file (Encl 7). In addition, the USAIRR contains completed criminal investigation files, completed investigative files dealing with espionage or security investigations involving the Army and files in the other categories specified in Army Regulation 381-45.

Under normal circumstances, an individual is not permitted to review material contained in his file at the USAIRR. Of course, the individual is provided with

copies of any statements which he submitted. However, according to paragraph 4-5, Army Regulation 604-5, a security clearance may not be denied or revoked unless the clearance authority explains the basis for the denial or revocation and affords the individual the opportunity to rebut the specific derogatory information against him; exceptions to this procedure can be granted only on a case-by-case basis by me. In addition, an individual may request an interview in order to clarify material in his file; this interview and the individual's rebuttal in a clearance proceeding are placed in the file. Thus an individual seeking a clearance should be aware of any derogatory information of significance in his file and no adverse action can be taken against him until he is so aware.

Information in a file at the USAIRR is, once action is completed, considered an historical record of the security clearance action. Accordingly, there is no procedure for removing or correcting documents in the file once action is completed. While an investigation is pending, the Intelligence Command makes every effort to limit information to appropriate matters relevant to the issues under consideration and, where conflicting evidence is developed, is expected to order further investigations.

Access to USAIRR files is strictly limited to those with a "need-to-know." Files are treated as if they contained Secret information so that special transmittal procedures are necessary to insure limited distribution. Access to files is limited to Department of Defense and other Government agencies with a legitimate interest in the personal security field. I have attached a copy of Army Regulation 381-46 establishing Army policy on the use of USAIRR files by non-Army agencies (Encl 8). I have also attached a book listing those authorized to request USAIRR files (Encl 9).

With reference to your questions about civil disturbance intelligence activities, I should point out that this activity is separate and apart from the USAIRR. As you noted in your letter of 27 February, Mr. Jordan's letter dealt primarily with the civil disturbance activities of the U.S. Army Intelligence Command. As noted in that

letter, the civil disturbance computer data bank at Fort Holabird has been discontinued and destroyed since the information in the computer was not useful in view of the Army's limited civil disturbance mission. "Spot reports" which provided the basis for entries into this computer have been routinely destroyed for some time. I have attached a copy of a memorandum signed by Secretary Resor on 5 March 1970, concerning the subject of computerized data banks within the Army (Encl 10). You will note that this memorandum prohibits the operation or establishment of any computer data banks concerning civilians or civilian activity unless the specific data bank is approved by the Chief of Staff and the Secretary of the Army. Your Subcommittee and other interested Committees of the Congress will be informed in these specific instances.

Under our current policies, reports concerning civil disturbances will be limited to matters of immediate concern to the Army—that is, reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and the National Guard to control. These reports will be collected by liasion with other Government agencies and reported by teletype to the Intelligence Command. They will not be placed in a computer (in fact, there never has been a direct link between the teletype reporting system and the computer). These reports are destroyed 60 days after publication or 60 days after the end of the disturbance. This limited reporting system will ensure that the Army is prepared to respond to whatever directions the President may issue in civil disturbance situations and without "watching" the lawful activities of civilians.

I should note that the Assistant Chief of Staff for Intelligence of the Department of the Army is responsible for providing analyses of matters of concern to the Army; to perform this function, the Counter Intelligence Analysis Division has been established in his office. This Division has a world-wide analysis function and is responsible for reviewing counterintelligence material for all Army areas of interest. The Division does not collate

information on a broad basis and only has information needed to answer specific questions of concern to the Department of the Army. This Division will, of necessity, have office files concerning civilian activity. For example, the Division is responsible for determining cities where civil disturbance potential is high so that Army officials can prepare civil disturbance plans. Such plans become the basis for the application of minimal force to restore stability when ordered by the President. In the course of this analysis, information is received from the FBI and collected in order to permit evaluation. These files, along with the world-wide counterintelligence files are stored on microfilm because of the volume of the latter; but they are not computerized and there are no plans to computerize them. In our view, the activities of the Counter Intelligence Analysis Division do not involve an invasion of privacy or constitute an improper activity for the Army to perform. The limited questions responded to by this Division in the civil disturbance field are ones of legitimate concern to the Army. The Division is closely supervised by the Assistant Chief of Staff for Intelligence and is not permitted to consider matters beyond its limited area of concern.

The Counterintelligence Analysis Division did compile an identification list from federal and local authorities on individuals and organizations associated with civil disturbances. This list was last updated in late 1969 and is available to a limited number of Department of Army organizations with civil disturbance responsibilities. The lists are now out of date, and are not considered necessary to satisfy the limited intelligence requirements referred to above. Accordingly, existing lists are being withdrawn from the field and destroyed, and new lists are not being prepared.

Your letter of 27 February expressed concern over how the Army could have engaged in the practices described in Mr. Jordan's letter. I believe it is important to place this matter in proper perspective. The Army provided troops to assist local authorities in controlling civil disturbances in Detroit and during the disturbances

following the death of Dr. Martin Luther King; prior to this time, Army troops had not been used for this purpose since 1942. Obviously, after the death of Dr. King, it was impossible to predict exactly what level of action the Army should adopt in order to be prepared to deal with disturbances if the President should direct the Army to act again. Thus the Army began to collect information in order to be prepared to meet its civil disturbance requirements. This collection, despite allegations to the contrary, never reached proportions even approximating the charge that the Army was "watching" civilian politics on a broad scale. Our continuing policy has been to reduce the scope of the Army's activities to only those needed to accomplish our mission; reductions in the level of activity have been made as our experience indicated that a given course of action was not required. In fact, our latest actions to reduce the level of intelligence activity have been under study for some time. The Vice Chief of Staff and I are both personally involved in this continuing review.

I hope that the information set out above will satisfy your concern. I will be happy to answer any further questions you may have or meet with you to discuss this matter.

Sincerely,

THADDEUS R. BEAL
Under Secretary of the Army

10 Enclosures
as stated

APPENDIX G TO PLAINTIFFS' MEMORANDUM

DEPARTMENT OF THE ARMY
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D.C. 20310

March 20, 1970

Honorable Cornelius Gallagher
House of Representatives
Washington, D.C. 20515

Dear Mr. Gallagher:

This is in response to your request for further information about certain Army intelligence activities and data systems and their relationship to individual privacy. Some portions of this letter repeat information given to you by Mr. Jordan's previous letter and his discussion with you. I have done this in order to clarify the matter from the overall standpoint.

The principal activity of the U.S. Army Intelligence Command is to conduct investigations to determine whether uniformed members of the Army, civilian employees and contractors' employees should be granted access to classified information. The U.S. Army Investigative Records Repository (USAIRR) was established to serve as a central filing system for all security and criminal investigations. The USAIRR contains approximately 7 million files relating to these types of investigations. The overwhelming majority of these files are standard paper files. However, some of the older files, forwarded from field agencies for centralized storage at the USAIRR, are on microfilm. In addition, the USAIRR microfilms an average of 22 files per day. Only those files requested for use by remote Army agencies in connection with security adjudications are microfilmed in order to reduce the bulk for mailing and the risk of loss.

Army and Department of Defense policies provide that investigative files are not to be summarized and that

officials taking action based on these files should review the entire file. As Mr. Jordan's letter noted, the cards in the Defense Central Index of Investigations contain only basic information relating to the identification of the individual concerned and the location of the file. When USAIRR files are microfilmed for transmittal purposes, the entire file is microfilmed. There is no plan to microfilm all the files in the USAIRR; the cost and effort required for such an operation would be prohibitive.

With reference to your questions about the Army's civil disturbance intelligence activities, as Mr. Jordan pointed out, the Army has, for some time, been reviewing its intelligence activities with a view towards keeping these activities to the minimum essential for the Army to perform its mission. As noted by Mr. Jordan, the Intelligence Command published from 14 May 1968 to 24 February 1969, an identification list which included the names and descriptions of individuals who might be involved in civil disturbance situations. The Assistant Chief of Staff for Intelligence of the Department of the Army directed on 18 February 1970 that all copies of this identification list be returned from Army field agencies to the Intelligence Command where they were to be destroyed. Destruction of these lists has begun and will be completed shortly.

As Mr. Jordan also noted, the Intelligence Command previously operated a computer data bank for storage and retrieval of civil disturbance information concerning incidents, which also captured certain information on participating individuals. The civil disturbance data bank was discontinued since it was determined that it was not required to support the Army's civil disturbance mission. The data bank was destroyed pursuant to orders issued by the Assistant Chief of Staff for Intelligence on 19 February. I have attached for your information a memorandum signed by Secretary Resor on March 5, 1970 concerning the subject of computerized data banks within the Army. You will note that this memorandum prohibits the operation or establishment of any computer data banks concerning civilians or civilian activity un-

less specifically approved by the Chief of Staff and the Secretary of the Army and after notice to your Subcommittee and other interested Committees of the Congress.

The information contained in the computer data bank was based primarily on "spot reports" submitted by military intelligence agents as a result of their liasion activities with other Government civilian agencies. The Army does not retain the original spot reports for more than 60 days since they relate to specific events and therefore are of transitory interest. As noted by Mr. Jordan, reporting is now limited to incidents where there is a high potential for violence and disorder growing beyond the capability of state and local police and the National Guard to control.

The only other "intelligence files" concerning civilians maintained by the Army consist of the files maintained by the Counterintelligence Analysis Division. The Assistant Chief of Staff for Intelligence of the Department of the Army is responsible for providing analyses of matters of concern to the Army. To perform this function, the Counterintelligence Analysis Division has been established in his office. This Division has a world-wide counterintelligence analysis function and is responsible for reviewing data for all Army areas of interest. The Division only develops civil disturbance information needed to answer specfic questions of concern to the Department of the Army. This office will, as a consequence, have limited filed concerning civilian activity. For example, the Division is responsible for identifying factors which affect civil disturbance potential so that Army officials can prepare civil disturbance plans. In the course of these analyses, information is received from the FBI and collated in order to permit evaluation. These files, along with the world-wide counterintelligence files are stored on microfilm because of the volume; they are not computerized, nor is there any plan to do so. In our view, the limited activities of the Counterintelligence Analysis Division constitute a proper activity of the Army in view of the mission requirements relating to civil disturbances imposed on the Army pursuant to law. The limited ques-

tions asked this Division in the civil disturbance field are ones of legitimate concern to the Army.

The Counterintelligence Analysis Division did compile an identification list from federal and local authorities on individuals and organizations associated with civil disturbances. This list was last updated in late 1969 and is available to a limited number of Department of Army organizations with civil disturbance responsibilities. The lists are now out of date, and are not considered necessary to satisfy the limited intelligence requirements referred to above. Accordingly, existing lists are being withdrawn from the field and destroyed, and new lists are not being prepared.

I trust that the information above will satisfy your concerns. I share your view that Army intelligence activities involving civilians must be strictly limited to matters essential to assigned Army missions, and I personally assure you that the Department of the Army will adhere to that principle.

Sincerely,

THADDEUS R. BEAL
Under Secretary of the
Army

AFFIDAVIT OF ROBERT E. JORDAN, III
GENERAL COUNSEL, DEPARTMENT OF THE ARMY

I, ROBERT E. JORDAN, III, being duly sworn, depose and state:

1. I am General Counsel of the Department of the Army. At all times relevant to this affidavit I have been serving either as Deputy General Counsel, Acting General Counsel, or General Counsel, Department of the Army. In July and August 1967 I was involved in planning activities to deal with potential civil disturbances in Washington, D.C. in my capacity as Deputy General Counsel, and since September 21, 1967, as Acting General Counsel and General Counsel, I have served as the principal Secretariat advisor to the Secretary and Under Secretary of the Army on civil disturbance matters, and that capacity have been directly and personally involved in Army civil disturbance planning, as well as in all operations involving the commitment of Federal troops to assist State or local authorities.

2. In July 1967, Federal troops were provided by President Johnson to assist authorities in Detroit, Michigan, pursuant to Chapter 15 of Title 10, U.S.C. Although Federal troops had been used in recent years in connection with desegregation problems and the enforcement of court orders, Federal troops had not been used to assist local authorities in dealing with widespread disorder in the nature of urban civil disturbance since 1943, when troops had been used in that capacity in Detroit. Accordingly, while the Department of the Army had general contingency plans for operations in support of local authorities to restore law and order, these plans were general in nature, and reflected the fact that there had been no occasion for such use of troops since 1943.

3. As a result of the disorder in Detroit in July 1967, the Army initiated a comprehensive review of civil disturbance plans, training and operations. The general review led to the development of a detailed family of contingency plans for operations in support of local authorities. The overall plan for such operations nationwide

was known as Garden Plot. The plan specifically tailored towards operations in the Washington metropolitan area known as Cabin Guard. A copy of the basic Cabin Guard plan is attached hereto. The revised plans were elaborations of more general plans which had been in existence for a number of years. Generally speaking, the revised plans involved a great deal more detail in terms of identifying a designating available forces, prescribing detailed training programs to be completed by troops with a potential civil disturbance assignment. In particular, they emphasized the necessity for careful and extensive coordination of all Government agencies affected by a civil disturbance at the Federal, State and local levels.

4. Planning for potential civil disturbances in the Washington, D.C. metropolitan area was given particular emphasis at the highest levels of Government. Before Federal troops had been withdrawn from Detroit as a result of the July 1967 disturbance there, a special Washington civil disturbance task force was created at the initiative of Secretary of Defense Robert McNamara. Members of the task force were as follows:

Members

Mr. David E. McGiffert, Under Secretary of the Army —Chairman

Mr. Stephen J. Pollak, White House

Mr. Walter N. Tobriner, D.C. Commissioner

Mr. Carl Belcher, Justice Department

Mr. Richard Fryklund, Deputy Assistant Secretary of Defense (Public Affairs)

Mr. Alfred B. Fitt, General Counsel, Army

Chief John B. Layton, Chief of Police, Washington, D.C.

Maj. General F. S. Greenlief, Deputy Chief, National Guard Bureau

Brig. General H. W. Hollis, Director Operations, Army

Col. George M. Bush, Secretary

Other Contributors

Lt. General Jonathan O. Seaman, 1st Army Commander, Ft. Meade
Maj. General Carl C. Turner, The Provost Marshal General, Army
Maj. General L. J. Fuller, Assistant Judge Advocate General, Army
Maj. General W. P. Wilson, Chief National Guard Bureau
Maj. General Howard W. Penney, Chief of Legislative Liaison, Army
Maj. General C. J. O'Malley, Commanding General, Military District of Washington
Mr. Rufus Youngblood, Secret Service
Mr. Edward I. Selig, Justice Dept.
Mr. Martin D. Richman, Justice Dept.
Mr. Robert E. Jordan, Deputy General Counsel, Army
Mr. Bland West, Office of General Counsel, Army
Colonel C. A. Peterson, 1st Army
Colonel C. Y. Talbott, 1st Army
Colonel C. B. Boswell, 1st Army
Mr. Henry Galotta, Fire Chief, D.C.
Lt. Colonel C. D. O'Connor, Plans & Programs, Office Assistant Secretary of Defense (Public Affairs)
Lt. Colonel Corcoran, Assistant Secretary of the General Staff

5. The task force held its first meeting on July 27, 1967, and held several additional meetings during the days which followed. These meetings were lengthy explorations of the areas to be covered by civil disturbance plans for the Washington metropolitan area. In addition, the planning meetings produced an assignment of tasks to be completed by participating individuals and agencies, with reports back to the task force on an accelerated schedule. The first finished product of this planning effort appeared on August 2, 1967 in the form of a summary of the results to date from the task force activities. That summary covered basic policies; available forces; the alert, assembly and commitment of forces; command and control (including relationships be-

tween military and civilian police authorities); the rules of engagement (those policies relating to the use for force by military and civilian personnel); communications equipment and supplies; fire protection, curfew, store closure and gasoline sale policy; provisions for arrests, arraignment and confinement; public and Congressional relations policy; and intelligence and incident reports. Subsequently, on August 24, 1967, a slightly revised and updated version of the planning summary was issued.

6. The policies outlined in the planning summary remained in effect through April 1968. During the period between August 1967 and April 1968, however, the participating agencies implemented the general plans and policies in considerable detail. There were numerous meetings between military officials, principally those of the Military District of Washington, and local police authorities. A special command post with pre-installed communications equipment was completed in the Municipal Building at 300 Indiana Avenue, Washington, D.C. the building which also is the headquarters of the Metropolitan Police Department. In addition, necessary preparations for a demonstration at the Pentagon on October 21-22, 1967, provided the occasion for most of the agencies which were involved in the July-August planning effort to jointly participate in planning and executing joint operations in connection with that demonstration.

7. In all of our planning for the use of Federal troops to support local authorities, a basic underlying policy was to assure that the commitment of Federal forces took place only where local authorities were unable to control a disorder. It was the view of the Secretary of Defense and the Secretary of the Army, a view which was also expressed by Justice Department representatives, (including then Deputy Attorney General Warren Christopher) that serious issues of Federal-State relationships were involved in the use of Federal troops to suppress disorder, and that there were dangers to our established political institutions in an excessive reliance on Federal forces, as opposed to those available to the Governor and local authorities, to deal with urban dis-

orders. Federal policies concerning providing Federal troops were set forth in a letter from Attorney General Clark to State Governors, dated August 7, 1967. Officials of the Justice Department and the Department of Defense recognized, however, that the special status of Washington, D.C. as a Federal enclave, coupled with the limited size of the District of Columbia National Gaurd, requires a less restrictive policy in the commitment of Federal troops in Washington, D.C. Nonetheless, it was still recognized that every effort should be made to contain disorders without resorting to the commitment of Federal troops.

8. On April 4, 1968, I was in my office at the Pentagon at approximately 7:30 p.m. when the Army Operations Center called to advise me that Dr. Martin Luther King. Jr., had been shot in Memphis, Tennessee. To my knowledge, the Operations Center also notified other Army civilian and military officials concerned with civil disturbance matters, and the Army Operations Center immediately began to monitor civil disturbance developments nationwide, including those in Memphis and in Washington, D.C. By 8:30 on the evening of April 4, a meeting had begun in the Army Operations Center under the chairmanship of Mr. David E. McGiffert, then Under Secretary of the Army, who had been designated by the Secretary of Defense and the Secretary of the Army as the civilian official directly and personally responsible for and in charge of civil disturbance matters. I also attended that meeting. Military officials present included Brigidier General Harris Hollis, Director of Operations for the Army, and his Deputy, Brigadier General John J. Hennessey. The Chief of Staff of the Army, General Harold K. Johnson, was in direct contact with the Army Operations Center from his office nearby.

9. During the evening of April 4, I remained in the Army Operations Center throughout until approximately 5:00 a.m. on the morning of April 5. During the evening and early morning Under Secretary McGiffert spoke by telephone to officials at the Department of Justice (principally Mr. Warren Christopher) and with District of Columbia officials (including Mayor Washington and

Director of Public Safety Murphy) and kept Mr. Paul Nitze, then Deputy Secretary of Defense, advised of developments. He also made periodic reports to the Secretary of the Army, Mr. Stanley R. Resor, who was kept advised throughout the disorders. Throughout the evening we received situation reports from the Metropolitan police concerning developments in Washington. Beginning at approximately 10:30 p.m. on April 4, the Chief of Staff of the Army, General Johnson, began directing certain actions to improve the alert and response time of Federal forces. Strike Command at MacDill Air Force Base, Florida, was asked to report on the availability of transport aircraft for troop movements. Two battalions located at Fort Bragg, North Carolina, were put on a six hour alert status. Military District of Washington officials were ordered to report to the command post in southwest Washington, near Fort McNair. A company of the 3d Infantry at Fort Myer was placed on alert for deployment on thirty minutes' notice. Subsequently, at about 12:15 a.m. on April 5, an additional company at Fort Myer was placed on alert, and the 2d Squadron of the 6th Armored Cavalry Regiment at Fort Meade was alerted, with one troop (approximately 150-180 men) ready to move in one hour. In addition, the Continental Army Command at Fort Monroe, Virginia, was increasing the alert posture of forces throughout the United States because of the situation nationwide as well as in Washington, D.C.

10. At approximately 2:00 a.m., April 5, I spoke to either Public Safety Director Murphy of Chief Layton —I cannot now recall which—concerning the situation in Washington. I was advised that the police judgment was that the disturbance was subsiding, and could be controlled during the early morning by the police force as it became fully mobilized. At Mr. McGiffert's direction, I scheduled a meeting to be held in the Army Operations Center at approximately 3:15 a.m. April 5. General Ralph Haines, then Vice Chief of Staff of the Army, was the senior military officer present. Public Safety Director Murphy attended as did General Southward, Commanding General of the D.C. National Guard, and Mr.

Thomas J. McTiernan, a Justice Department lawyer who represented the Attorney General. Brigadier Generals Hollis and Hennessey also attended. The meeting addressed the manner and various alternative legal bases for utilizing the National Guard of the District of Columbia. No final decision was made concerning alerting or calling the National Guard at that time. At the meeting we were concerned about what would happen at nightfall on April 5, which was considered to be the time when the police might need the assistance of the National Guard or Federal troops. Previous limited experience with urban civil disorder had indicated that the evening of the second day was the likely time for a resurgence of disorder. General Southward advised those attending the meeting that it would take approximately six hours to assemble the D.C. National Guard in the Armory. Based on this six hour assembly time, and on the potential need to have the Guard available on the evening of April 5, it was generally agreed that a decision concerning assembling the Guard in the Armory should be made in the vicinity of noon on April 5. The decision with respect to calling the Guard had to be made in advance of any decision on use of Federal troops, because the Guard, an organization composed of civilians who were scattered at locations throughout the Washington metropolitan area, had a substantially longer assembly and reaction time than did the Federal forces at locations such as Fort Myer, Virginia, and Fort Meade, Maryland. In addition, it was felt that if only moderate augmentation of the police were required, the availability of the Guard in the Armory would make it possible to assist the police without deploying Federal troops into the city.

11. During the morning of April 5, consultations between Army officials and those of the city and the Department of Justice continued. At 8:00 a.m. on April 5, the situation in the city appeared to be under control and relatively calm, according to the reports I received at that time.

12. Also on the morning of April 5, a meeting was scheduled for 11:00 a.m. with President Johnson at the

White House. I did not attend that meeting, but Under Secretary McGiffert did, and it is my understanding that Mayor Washington, Deputy Attorney General Christopher, and Director of Public Safety Murphy also attended. While the White House meeting was taking place, the Secretary of the Army and I were holding a meeting with military officials and the Commanding General of the D.C. National Guard in the Army Operations Center in the Pentagon. During our meeting, Secretary Resor consulted with Mr. McGiffert at the White House, and at approximately 12:30-12:45, before we had received any reports of renewed disturbances, it was agreed that the major elements of the District of Columbia Guard should be ordered to the D.C. Armory on a drill status. Secretary Resor immediately instructed General Southward to assemble the units in question as soon as possible. We thought at that time that assembling the units might be accomplished in as little as four hours.

13. Between 1:00 and 2:00 p.m. on April 5, I was in the Army Operations Center, and we began to receive reports of crowds assembling, with window breaking and looting, and some fires, in the upper 14th Street and 7th Street N.W. areas of the District of Columbia. At about 1:30 p.m., the Vice Chief of Staff, General Haines, ordered all units of the 3d Infantry at Fort Myer on a thirty minute alert immediately. As indicated earlier, prior to this time various units had been placed on increased alert. For instance, some units of the 6th Armored Cavalry Regiment, and the 3rd Infantry were prepared to begin moving toward their assembly areas in from 1½ hours to 2 hours. Other units were prepared to come under increased alert—thirty minutes to one hour—as of 6:00 p.m. that evening. At about 2:00 p.m. a meeting was held at the Pentagon chaired by Under Secretary McGiffert, and attended by Army Chief of Staff Johnson, Assistant Attorney General Vinson, and Metropolitan Police Chief Layton. I also attended the meeting. At approximately 2:45 p.m., we were advised than an Executive Order and Proclamation authorizing Federal troops had been delivered to the White House, and that Deputy Attorney General Christopher, General Haines

(who had been designated to command any Federal troops which might be required), and Public Safety Director Murphy were conducting a personal reconnaissance of the areas affected. About 3:00 p.m. General Hollis, who was in the Pentagon, was directed by General Haines to establish a military staff at the command post in the Metropolitan Police headquarters. At approximately 3:10 p.m., Under Secretary McGiffert initiated the order to move the 2d Squadron of the 6th Armored Cavalry Regiment from Fort Meade to Washington immediately, and the Army Chief of Staff, General Johnson, instructed the 91st Engineer Battalion from Fort Belvoir, Virginia, to move to its predetermined assembly area on the outskirts of Washington. These movements of troops were made in advance of a Presidential decision concerning the use of Federal troops on the streets, in order to shorten the response time in the event the Presidential decision to utilize Federal troops was made. We were advised at a few minutes past 4:00 p.m. on April 5 that the President had signed the Executive Order and Proclamation.

14. The first Army units arrived in the assembly areas in Washington approximately 4:30 p.m. on April 5, only one-half hour after the Executive Order was signed. Troops were deployed on the streets less than an hour later, and by 7:15 p.m. over 1600 troops were deployed on the streets. By about 10:30 p.m. that evening, about 6,000 troops had been committed to civil disturbance control operations in the District of Columbia. In several cases, troop units arrived at their assembly areas in the District in less than the estimated reaction time which was incorporated in Army plans. For example, the 2d Squadron, 6th Armored Cavalry, from Fort Meade, Maryland, reached its assembly point in the District in an hour and twenty minutes compared to a previously estimated reaction time of two and one-half hours. Similarly, the 91st Engineer Battalion from Fort Belvoir, Virginia, reached its assembly point in one and a half hours, against an estimated time of two and one-half hours. However, when troops began to leave their assembly areas to take up their assigned posts of duty

on the city streets, they were hindered by heavy traffic caused by the mass exodus of persons leaving the Washington downtown business area prior to normal closing hours as a result of conditions in the city. The same conditions also delayed the assembly of the District of Columbia National Guard.

15. In making decisions concerning the employment of Federal troops, a number of complex and inter-related policy considerations had to be assessed by those responsible for the decisions. From my participation in the discussions preliminary to these decisions, I know that some of the policy considerations were as follows:

(a) With respect to the use of active Armed Forces, as distinguished from the District of Columbia National Guard, I have already referred to the general policy of attempting to limit the use of active Armed Force for domestic law enforcement purposes because of concern over the intrusion of military forces into the civilian sphere.

(b) The alerting of active forces for potential use in civil disturbance operations cannot be undertaken independent of considerations relating to the role of the same troops in possible international operations. For example, at the time of the April disorders, a major effort was under way in the Army to improve the training readiness of the Army forces located in the continental United States. These forces, most of which are known as the Strategic Army Force (STRAF), are the principal forces available to the President in the event of a major or minor international contingency. Accordingly, their readiness to conduct operations pursuant to contingency plans in the international arena is of continuing concern to the Department of Defense. When any unit is placed on an alert posture which requires it to be ready to depart its home station within a few hours, normal training necessarily ceases as troops are unable to conduct field training, and must prepare themselves and their equipment for departure on short notice. Since there will be many more situations in which there is a potential for the use of active forces than situations in which they are actually employed, military officials must exer-

cise care that troop units are not placed on alert too frequently, or for excessive periods of time.

(c) An additional detrimental effect of short alert times is their impact on the physical and mental well being of the troops involved. When troops are placed on short alert, virtually all activities outside their immediate unit arch must be curtailed. With very short alert times in the one-two hour range, it may not even be opssible for personnel involved to sleep. The continuation of alerts for a long period of time can seriously degrade the effectiveness of the personnel in the units if they are later actually employed in civil disturbance operations.

(d) A complicating factor in the disorders in April 1968 was reports of disturbances in a large number of American cities substantially simultaneously. For example, there were serious disorders in Memphis, Chicago, Detroit, Baltimore, Pittsburgh, and other cities as well as in Washington, D.C., and subsequently the National Guard was employed in a state active duty role in approximately 23 cities. It was extremely difficult to project the course of events in many of these cities during the earlier periods of the disturbances. Accordingly, Department of Defense officials had to exercise care that the premature deployment of troops to a particular city might not preclude operations in another city where conditions might prove to be even more severe. In addition, maintenance of units to meet a potential international contingency had to be considered.

(e) Another major factor which had to be considered was the availability of airlift resources. In order to arrive without delay in the cities experiencing disorders, active forces committed to civil disturbance operations which were located any significant distance from the destination city must be transported by air. This transportation is provided, in the first instance, by Air Force aircraft equipped for troop carrier and cargo duty. Now, as then, the same aircraft, however, are constantly involved in transporting material to Vietnam and on other missions relating to the national defense. When troop units are placed on a short alert time, it is also necessary to divert aircraft from Vietnam missions and other missions and preposition them at or near the departure

station for the units. While so prepositioned, the aircraft are essentially useless for other operations. The factor had to be carefully weighed in making decisions concerning alert and deployment of forces.

(f) Even if aircraft are diverted and prepositioned, personnel fatigue with respect to air crews has an impact on alert time. For short alert times, air crews must be at or near their aircraft, an alert posture which cannot be maintained for extended periods of time because of safety factors relating to exhaustion of the crews. Under Air Force regulations designed to insure safety, once air crews have been on alert for a specified period of time, they had to be released from alert and given a rest period of a number of hours. Since duplicate crews were not always available, officials in the Department of Defense have to constantly consider the problem of air-crew exhaustion in determining whether to increase the alert posture of the transport aircraft.

16. After the initial military forces were committed to the control of the civil disturbance in Washington, D.C. on April 5, I was involved in the planning and events which led to the re-enforcement of the military forces in the Washington, D.C. area as well as the employment of Federal forces in Baltimore, Maryland, and Chicago, Illinois. During this period, the Army Operations Center was kept fully informed by General Haines of the efforts to control the civil disturbance in Washington, D.C. Under Secretary of the Army McGiffert remained in or in close contact with the Army Operations Center during the ensuing period until Federal troops were withdrawn from Washington, D.C. The Secretary of the Army and other Department of Defense officials were kept informed of developments in the city during the period when employment of military forces in Washington, D.C. succeeded in bringing the disturbance under control. From my observations of the events of the period, including personal reconnaisance of the civil disturbance area in Washington, D.C. on a number of occasions, it is clear to me that Federal troops did an outstanding job in meeting the very difficult and demanding task of controlling the disorder. They did this with

the minimum use of force consistent with the accomplishment of their mission to help the local civilian authorities to re-establish and maintain law and order in Washington, D.C. Of particular note is the marked contrast in the use of firearms by soldiers in Washington, D.C. as compared with the summer 1967 examples documented by the National Advisory Commission on Civil Disorders. This reflected the Department of Defense policy of strictly limiting the use of deadly force during a civil disorder with reliance placed instead on saturating an area with manpower and using CS (tear gas). It is clear to me that the outstanding accomplishments of the troops were directly related to the quality of the planning and the training programs initiated after the 1967 Detroit disturbances.

/s/ Robert E. Jordan, III
General Counsel

AFFIDAVIT OF ROBERT E. JORDAN III
GENERAL COUNSEL OF THE ARMY

I, ROBERT E. JORDAN, being duly sworn, depose and state:

1. I am General Counsel for the Department of the Army. At all times relevant to this affidavit, that is, since the Summer of 1967, I have been serving either as Deputy General Counsel, Acting General Counsel; or General Counsel of the Department of the Army. In those capacities I have served as the principal Secretariat Advisor to the Secretary and Undersecretary of the Army on civil disturbance matters and have been directly and personally involved in Army Civil Disturbance Planning, as well as in all operation involving the commitment of Federal troops to assist state or local authorities.

2. Under the plan by which the Departments of Defense and Justice (1) coordinate their preparations for their responses to any serious civil disturbances that may hereafter occur in a city in the United States and (2) to assist the President in responding appropriately and effectively to any request he may receive for Federal military troops to aide in suppressing such a disturbance or to enforce Federal law under 10 U.S.C. 3332 or to protect civil rights pursuant to 10 U.S.C. 3333, the Attorney General has been designated by the President as the Chief Civilian Officer in charge of coordinating all Federal Government activities relating to civil disturbances. The Attorney General is so designated because of his responsibilities as Chief Law Enforcement Officer of the Federal Government, and as Chief Legal Advisor to the President on the critically important decisions the President must personally make as to whether and when to permit military forces in response to an appropriate state request.

On the other hand, all essentially military preparations and operations, including especially the employment of military forces at the scene of a disturbance, is the primary responsibility of the Secretary of Defense. In discharging these function, he observes such law enforcement policies as the Attorney General may determine. To

the extent practical, such law enforcement policies are formulated during the planning stage so that military commanders can familiarize themselves with them and train their personnel to implement them. This assures that military planning and operations are consistent with Administration policy and the requirements of law.

The responsibilities of the Department of Defense under this plan are carried out principally through the Department of the Army, inasmuch as the Secretary of the Army is assigned primary responsibility for civil disturbance matters, as Executive Agent, subject to the general supervision of the Secretary of Defense. Within the Department of the Army, a Directorate for Civil Disturbance Planning and Operations serves the Secretary and the Army Chief of Staff as the principal military staff agency for such matters.

The Secretary of Defense has the primary responsibility for training, equipping, and designating the forces to be used in controlling civil disturbances. He also retains primary responsibility for preparing operation plans, determining procedures for alerting and moving the forces, and testing command and control arrangements. The Attorney General is consulted on important questions of law and law enforcement policy arising in connection with these plans and preparations.

When a State Governor anticipates that a request for Federal military assistance will shortly become necessary, he will confer with the Attorney General concerning the facts of the situation, so that the Attorney General can review the legal sufficiency of the impending request. After consultation with Department of Defense officials on the gravity of the situation, the Attorney General will advise the President whether the conditions would warrant honoring a request at that particular time.

When the Governor concludes that a formal request for military assistance is necessary, he will address it directly to the President. At such time, the President must exercise his personal judgment as to whether or not to commit Federal armed forces. The decision may be a difficult one, as it involves a weighing of the apparent need for Federal forces in the circumstances, and the

President's responsibility to respond to State requests for such assistance, against the primary responsibility of State and local authorities for maintaining local law and order, and the inadvisability of employing Federal military force for that purpose except in the last resort.

The Attorney General will have furnished the President with an appropriately drawn Proclamation and Executive Order, to be signed by the President in the event that he decides to honor the request. These documents will formalize the decision and state the factual and legal grounds on which it is based.

ROBERT E. JORDAN III
General Counsel of the
Army

AFFIDAVIT OF WARREN CHRISTOPHER

I, WARREN CHRISTOPHER, being first duly sworn, depose and state:

1. I am a partner in the law firm of O'Melveny & Myers located at 611 West Sixth Street, Los Angeles, California. From July 24, 1967 until January 20, 1969, I was the Deputy Attorney General of the United States with my office in the Department of Justice in Washington, D.C. In my capacity as Deputy Attorney General I was the second ranking official of the Department of Justice, responsible directly to the Attorney General, who at that time was Mr. Ramsey Clark.

2. I am making this affidavit based upon my personal knowledge of the events described below and my participation therein, as well as upon the official records and reports prepared by me, or at my request, or received by me as part of my official duties with the Department of Justice.

3. In my role as Deputy Attorney General following the riots in Detroit in July of 1967, I participated in the drafting of a letter from the Attorney General to the Governors of all the States dated August 7, 1967 which set forth the legal requirements and policies with respect to the use of federal troops to control civil disturbances. A copy of this letter is annexed hereto as Attachment 1 to this affidavit.

4. On April 4, 1968 shortly after 7:00 p.m. (EST), I was attending a regular weekly staff conference in the office of Attorney General Clark when we were notified by the Army Operations Center that Dr. Martin Luther King, Jr. had been shot in Memphis, Tennessee.

5. The Department of Justice had established an Information Unit on the Sixth Floor of the Justice Department building in February of 1968 primarily to collect immediate information about civil disturbances throughout the country. The information was received from a variety of sources including the FBI, Department of Army Operations Center, wire services, police departments and officials of various governmental agencies throughout the United States.

6. We received reports throughout the evening of April 4 relating to disorders in cities across the nation.

The first indication of a serious disturbance came at about 9:00 p.m. when we were advised that rioting was occurring in Memphis, Tennessee, and that the Governor of Tennessee had committed National Guard troops to that city.

7. Shortly thereafter, we began receiving reports from the Washington Metropolitan Police Department concerning the situation in Washington, D.C. The first reports indicated that large crowds were congregating in the vicinity of Dr. King's Washington, D.C. headquarters at 14th and U Streets, N.W., but that the mood of the crowd was one of shock and dismay rather than of violence. Shortly thereafter, we were advised that Stokely Carmichael was leading a crowd to various stores along 14th Street asking proprietors to close their businesses out of respect for Dr. King and that the store owners were complying with these demands.

8. President Johnson had appeared on national television shortly after 9:00 p.m. to announce the death of Dr. King to the nation and in a brief speech called on all citizens to reject violence. Because of the crisis by the assassination of Dr. King, President Johnson postponed a trip to Hawaii scheduled to commence the following day.

9. Commencing around 9:30 p.m. or shortly thereafter, we received the first reports that the mood of the crowd on 14th Street, N.W. was changing to one of violence. We were advised that store windows had been broken and looting and vandalism had occurred. We were further advised that police patrols were heavily outnumbered and that the police were attempting to seal off the areas of disorder in order to keep innocent passers-by out of the area of danger and to prevent the disorder from spreading.

10. As police civil disturbance forces arrived we were informed that an effort was made to close 14th Street from U Street north, but that the police were having difficulty in accomplishing this action because of the large crowd on the street. We were further advised that police and fire department forces were being subjected to verbal abuse and were the targets of missiles thrown at them.

11. At 10:20 p.m. Deputy Chief Hughes of the Metropolitan Police Department advised Assistant Attorney General Stephen Pollak of the Civil Rights Division and Assistant Attorney General Fred M. Vinson, Jr. of the Criminal Division that he was hopeful the trouble was subsiding. However, he said that he planned to hold the 4:00 p.m. to midnight shift on duty, and would have more manpower in half an hour as a result of having called the midnight shift of the police in early.

12. Between 9:00 p.m. and midnight we also received information of civil disorders in a number of other cities around the nation, including Nashville, Tennessee; Chicago; New York City; Raleigh, North Carolina; and New Haven, Connecticut.

13. In the early hours of April 5, I was advised that the looting and burning in Washington, D.C. had almost ceased and the city was relatively calm and under control. At my request Mr. Thomas J. McTiernan of the Department of Justice represented the Department at a meeting held in the Army Operations Center at the Pentagon at approximately 3:15 a.m. on April 5, 1968. The purpose of the meeting at the Pentagon was to evaluate the likelihood of further disorder on the following day. At that time the Department of Justice Information Unit was continuing to receive reports relating to disorders in other cities throughout the United States.

14. Between 4:00 and 5:00 a.m. Ramsey Clark left for Memphis to direct the FBI in its search for the assassin of Dr. King. Upon Attorney General Clark's departure from Washington, I was left in charge of the Department of Justice.

15. Commencing at 9:20 a.m. on April 5, I discussed with Mr. David E. McGiffert, the Under Secretary of the Army, alternative legal bases for calling the National Guard and federal troops into action in Washington if such troops were needed. Starting at 10:15 a.m. I spoke with Mr. Julian Dugas of the District of Columbia Government regarding the possible mobilization of the District of Columbia National Guard.

16. At 11:00 a.m. on April 5, I attended a meeting at the White House which President Johnson had called to

discuss means of avoiding further violence in the nation in general, and in particular racial violence occurring as an aftermath of Dr. King's assassination. This meeting with civil rights leaders was also attended by Mayor Walter E. Washington and Director of Public Safety Patrick Murphy of the District of Columbia, and Mr. David E. McGiffert, Under Secretary of the Army. Others in attendance included Congressional leaders of both parties, Cabinet officers and a number of prominent Negroes throughout the nation, including Robert C. Weaver, Thurgood Marshall, Bayard Rustin, Clarence Mitchell, Jr., Judge A. Leon Higgenbotham, Jr., Mayor Richard G. Hatcher of Gary, Indiana, Mrs. Dorothy I. Height, Reverend Leon Sullivan, Bishop George W. Baber, Whitney M. Young, Jr., Roy Wilkins, Clarence Mitchell III, and Reverend Walter E. Fauntroy.

17. At noon I met with Mr. McGiffert, Mr. Murphy, and Mr. Larry Temple, Special Counsel to the President, at the White House to discuss the general availability of troops and the possible need for additional federal assistance in Washington. Director Murphy stated that 1,000 police were on duty in Washington. At approximately 12:20 p.m., we agreed to recommend that the District of Columbia National Guard should be called to the D.C. Armory and put in a training status. At the conclusion of this meeting Mr. McGiffert and Director Murphy left the White House to go to the Pentagon. At about the same time Fred M. Vinson, Jr. represented the Department of Justice at a meeting in the Army Operations Center. At that meeting it was determined that the D.C. National Guard would be assembled in a drill status by Friday evening.

18. At 1:35 p.m. I advised Mr. McGiffert that we had received reports of new disturbances in Washington. At approximately 2:00 p.m. I received a telephone call from the White House directing me to make a personal investigation of the disturbance area to determine whether federal troops were required.

19. At 2:05 p.m. I asked Army Chief of Staff Harold K. Johnson to designate a Senior General Officer to report to the White House and accompany me on an in-

spection tour of the disturbance area in Washington to evaluate the need for federal troops. General Johnson advised me that General Ralph E. Haines, Jr., Vice Chief of Staff of the United States Army, would be commander of Task Force Washington if it were activated, and designated General Haines to accompany me.

20. A meeting was also scheduled at the Pentagon for 2:00 p.m. Fred Vinson represented the Department of Justice. This meeting was also attended by Mr. McGiffert, General Johnson, and Chief [redacted] the Washington Metropolitan Police Department John Layton. Mayor Washington was at that time in the White House discussing conditions in the city as they were reported by Deputy Mayor Thomas Fletcher.

21. At about 2:30 p.m., prior to leaving the White House on the inspection tour of the city, I had delivered to the White House a Presidential Proclamation and Executive Order authorizing the use of federal troops in Washington should the President decide to take such action.

22. As soon as General Haines arrived at the White House, he, Patrick Murphy and I left on the inspection tour of the disturbance areas of the city at about 2:45 p.m. We were travelling in Mr. Murphy's car. We found the streets crowded and we observed extensive looting and fires on 7th Street and 14th Street. Because of the rioting and the mass exodus of people employed in the downtown area the streets were jammed with traffic and our vehicle's progress was slow.

23. Mr. Murphy's car had a police radio but we were reluctant to communicate with the President or other high officials on this radio since the conversation could be overheard by the public. During the course of the trip, at about 3:00 p.m., we phoned the White House and left word how we could be reached by radio in the car. At about 3:45 p.m., when it appeared to all of us that federal troops were needed, I stopped at a phone booth to telephone the President. Because some of the available telephones were riot damaged and the telephone circuits were overloaded, we were delayed 10 to 15 minutes in completing the call. Shortly before 4:00 p.m. I reached the

President and advised him that General Haines, Director Murphy and I all recommended that federal troops be brought into the city as soon as possible. The President advised me then that he was signing the Executive Order and Proclamation authorizing the use of federal troops.

24. Previously, at about 3:30 p.m., General Haines had radioed to the Pentagon and asked that the troops be started moving from Fort Meade to Washington, and immediately after my discussion with the President, General Haines called General Johnson to make arrangements for activation and deployment of federal troops.

25. After making the telephone calls to the President and to the Chief of Staff, General Haines and I went to Metropolitan Police headquarters where General Haines assumed duty as Commander of Task Force Washington. I then telephoned Mr. Joseph Califano, Special Assistant to the President, at the White House to advise him of the current situation. I also phoned the Department of Justice and talked to the duty officer and advised as to the present situation.

26. I remained at police headquarters until the arrival of Cyrus Vance at about 5:30 p.m. I briefed him with respect to the present status of civil disturbances in Washington, D.C. I then returned to the Department of Justice. Attorney General Ramsey Clark returned to Washington from Memphis at about 8:00 p.m. Friday evening and again assumed charge of the Justice Department.

27. The following day, April 6, we continued to receive reports on the civil disturbances in Washington, D.C. as well as around the nation. In the evening of April 6 the White House requested that I leave for Chicago to determine whether the situation there required the presence of federal troops, and I left for Chicago by plane at about 7:30 p.m.

28. I returned to Washington, D.C. on April 8, and by that time the disorders in Washington were substantially over.

WARREN CHRISTOPHER

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530
(Letterhead)

Dear Governor:

At the President's request, I am writing you regarding the legal requirements for the use of Federal troops in case of severe domestic violence within your state. The requirements are simple. They arise from the Constitution. So the principles will be clearly in mind, I will briefly outline here the basic considerations of Federal law applicable to such a situation.

The underlying constitutional authority is the duty of the United States under Article IV, Sec. 4, to protect each of the states "on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence." This pledge is implemented by Chapter 15 of Title 10, U.S.C. and particularly 10 U.S.C. 331, which derives from an act of Congress passed in 1792. The history of the use of Federal forces at the request of governors in varied circumstances of local violence over more than a century is also instructive.

There are three basic prerequisited to the use of Federal troops in a state in the event of domestic violence:

(1) That a situation of series "domestic violence" exists within the state. While this conclusion should be supported with a statement of factual details to the extent feasible under the circumstances, there is no prescribed wording.

(2) That such violence cannot be brought under control by the law enforcement resources available to the governor, including local and State police forces and the National Guard. The judgment required here is that there is a definite need for the assistance of Federal troops, taking into account the remaining time needed to move them into action at the scene of violence.

(3) That the legislature or the governor requests the President to employ the armed forces to bring the violence under control. The element of request by the governor of a State is essential if the legislature cannot be

convened. It may be difficult in the context of urban rioting, such as we have seen this summer, to convene the legislature.

These three elements should be expressed in a written communication to the President, which of course may be a telegram, to support his issuance of a proclamation under 10 U.S.C. 334 and commitment of troops to action. In case of extreme emergency, receipt of a written request will not be a prerequisite to Presidential action. However, since it takes several hours to alert and move Federal troops, the few minutes needed to write and dispatch a telegram are not likely to cause any delay.

Upon receiving the request from a governor, the President, under the terms of the statute and the historic practice, must exercise his own judgment as to whether Federal troops will be sent, and as to such questions as timing, size of the force, and federalization of the National Guard.

Preliminary steps, such as altering the troops, can be taken by the Federal government upon oral communications and prior to the governor's determination that the violence cannot be brought under control without the aid of Federal forces. Even such preliminary steps, however, represent a most serious departure from our traditions of local responsibility for law enforcement. They should not be requested until there is a substantial likelihood that the federal forces will be needed.

While the formal request must be addressed to the President, all preliminary communications should be with me. When advised by you that serious domestic violence is occurring, I will inform the President and alert the proper military authorities. You can reach me at my office, my home, or through the White House switchboard at any hour.

Enclosed are copies of the relevant constitutional and statutory provisions and a brief summary of past occasions on which a governor has requested Federal military assistance. Your legal counsel, I am sure, keeps you fully advised of requirements of state law as well.

If you have any questions or comments, please let me know.

Sincerely,

Attorney General

Enclosures

THE CONSTITUTION

Article IV, Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence.

TITLE 10, UNITED STATES CODE

Chapter 15

§ 331. Federal aid for State governments.

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be conveined, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

* * * *

§ 334. Proclamation to disperse.

Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

STATE REQUESTS FOR FEDERAL ASSISTANCE IN SUPPRESSING DOMESTIC VIOLENCE

A. Chronological List

1838—Buckshot War. The Pennsylvania Governor asked for Federal assistance (based on Const. Art. IV, sec 4) in restoring order when violence resulted from a bitter political contest. President Van Buren refused on the ground that Federal interference is justified only where domestic violence in such that State authorities have proved inadequate.

1842—Door Rebellion. Rhode Island Governor King asked for assistance to stop the attempt of Dorr to claim the Governorship. President Tyler replied that the time for Federal interference had not arrived since there was no actual insurrection. Further requests were denied on the ground that the legislature was in session and the Governor therefore was not authorized to apply for aid. The President said he would issue a proclamation if a lawful request was made, but Dorr disbursed his troops and this was not done.

1856—San Francisco Vigilance Committee. California Governor requested Federal aid in stopping the Committee from usurping the authority of the State. The Attorney General advised President Pierce that the circumstances did not afford sufficient legal justification for Federal assistance since there was no "actual shock of arms" between insurgents and the State, and the State had not exhausted its powers to deal with the situation. (8 Op. A.G. 8) The President took no action.

1873—New Orleans unrest. Lawlessness due to racial problems and also political uncertainty as to proper occupants of political office resulted in violence. Louisiana Governor asked for Federal help. President Grant issued a proclamation ordering the insurgents to disperse. Failure to heed the proclamation and increased disturbance resulted in a further proclamation and dispatch of two regiments.

1876—South Carolina riots. Riots resulted from an altercation between the Ku Klux Klan and Negro state militia. The President issued a proclamation in response to a call for Federal intervention and troops were stationed at 70 places in the State to secure the peace during the election. (This action culminated in enactment of Posse Comitatus Act of 1878).

1877—Railroad Strike riots. Upon request for Federal intervention, President Hayes issued proclamations with respect to West Virginia, Maryland, Pennsylvania and Illinois to restore order. The Ohio Governor asked for and received Federal arms but did not request troops. Indiana asked the President to authorize the commandant at the U.S. arsenal to aid the state. On the ground that the request was incorrectly made, the Governor was informed that Federal troops would be used only to protect U.S. property. Michigan, Wisconsin and California also made requests for help but the situation in those states did not become critical.

1892—Idaho's Coeur d'Alene mining disturbances. During a seven year period, President Harrison, Cleveland and McKinley furnished Federal assistance which was requested by Idaho Governors.

1894—Coxey's Army of unemployed. President Cleveland instructed the army to assist Montana in handling violence of a Coxeyite contingent in Montana, at the Governor's request. However, the President did not issue a formal proclamation.

1903—Colorado mining strike disturbance. President Theodore Roosevelt denied assistance to the Colorado Governor who made two requests for "such aid as I may call for", but promised that the Federal Government would act when a request was made in a manner "contemplated by law", explaining that under H.R. 5297 there must be shown an insurrection against the State and inability of the State to control it.

1907—Nevada mining disturbance. In response to an urgent request from the Governor, President Roosevelt

ordered troops to assist. Later, a President's investigating committee found there was no warrant for the assertion that the civil authority of the state had collapsed. After the President threatened withdrawal of the troops, the Governor convened the legislature, which asked that Federal troops remain for a short period until the State Police could be organized and equipped to handle the situation.

1914—Colorado coal strike. At the request of the Governor, President Wilson sent troops to stop rioting, but only after considerable negotiation and exploring of avenues of peaceful resolution by Government representatives failed.

1919—Race riots in Washington, D.C. and Omaha; Gary steel strike. On the theory that the service by the National Guard in the war left the States without adequate protection against internal disorders, the Secretary of War instructed commanders to the departments to respond to state requests for assistance. The use of Federal troops in 1919 was without a proclamation or other formalities.

1921—West Virginia coal mine warfare. President Harding was requested by the Governor to intervene. The President stated that he was not justified in using Federal military forces until he was assured the State had exhausted all its resources. A subsequent outburst of violence resulted in a Proclamation and order to dispatch Federal troops. The troops met no resistance and disarmed the miners.

1932—The Bonus Army. Needy veterans who came to Washington to seek veterans' bonus legislation were housed in tents, shacks, and government buildings which were being demolished. The Treasury Department attempted to repossess a government building in order to continue demolition, resulting in a clash between the veterans and police. The District Commissioners asked the President for assistance and the army moved in, cleared the buildings and destroyed the shacks. No proclamation was issued.

1943—Detroit race riots. The Governor advised that the State was unable to suppress domestic violence, the President issued a proclamation and Federal troops were dispatched.

1967—Detroit riots. The most recent incident, of course, was the dispatch of Federal troops to Detroit on July 24, 1967 at the request of the Governor. President Johnson issued a proclamation and Executive Order pursuant to Chapter 15 of Title 10, U.S. Code.

AFFIDAVIT OF FRED M. VINSON, JR.

I, Fred M. Vinson, Jr., being first duly sworn, depose and state:

1. I am an attorney and a partner in the law firm of Reasoner, Davis & Vinson with offices at 800 Seventeenth Street, N.W. in Washington, D.C. From April 1965 until January 1969, I was the Assistant Attorney General in charge of the Criminal Division of the Department of Justice.

2. One of my responsibilities at the Department of Justice was to participate in establishing an Information Unit within the Department of Justice. The Information Unit had direct line telephones to the Metropolitan Police Department in Washington, D.C., the Army Operations Center, the Secret Service, the United States Attorney's office, the Park Police, the Capitol Police and the General Service Administration. It also received written and oral reports from the FBI, from Army Intelligence, from the D.C. Metropolitan Police Force and police departments throughout the United States as well as from the national wire services and local radio stations. The Information Unit was closed in the fall of 1967 but was re-established in early 1968. The Information Unit had first been organized in 1967 and was established primarily to collect information about civil disturbances throughout the country as quickly as possible.

3. On January 11, 1968, Attorney General Ramsey Clark sent me a short memorandum asking me to establish a "Law Enforcement Task Force" for the District of Columbia, with representation from the Metropolitan Police Department, the Capitol Police, the Park Police, General Services Administration, Department of Defense, and "such other law enforcement agencies as may be necessary." The Attorney General stated that the Task Force was "to have the responsibility, on a permanent basis, of anticipating law enforcement problems in the District of Columbia of a civil disobedience, massive demonstration, or riot potential nature, which will require multiple agency handling." He further asked that each agency designate a permanent representative who would

be responsible for initiating information interchange and coordination whenever the need arose.

4. I then intiated steps to set up a Task Force on Law Enforcement in the District of Columbia: I was Chairman of the Task Force and other members included Major General Charles L. Southward, Commanding General of the D.C. National Guard; Chief Walter W. Lange of the U.S. Park Police; Captain Roy Hill of the White House Police; Mr. Jack Parker of the U.S. Secret Service; Chief John B. Layton of the Metropolitan Police Department; Patrick V. Murphy, Director of Public Safety of the District of Columbia; Brigadier General John J. Hennessey, Deputy Chief of Staff for Operations for the Department of the Army; Chief James M. Powell of the U.S. Capitol Police; Mr. Louis V. Milici, Chief, Protection Division of the General Services Administration; David G. Bress, U.S. Attorney for the District of Columbia; and James McShane, Head, Executive Office for U.S. Marshals, U.S. Department of Justice.

5. In addition to the Task Force, I established a "working Group" under the direction of Thomas J. McTiernan of the Criminal Division. This Group included representatives of the agencies included on the Task Force and other interested personnel. The purpose of the Working Group was to provide staff support in the form of working drafts and recommendations for the use of the Task Force.

6. At about this same time, in early 1968, I instructed a group of attorneys in the Criminal Division to prepare a compendium of federal and local laws relevant to civil disturbances in the District of Columbia. Such a compendium was prepared on March 22, 1968 and was distributed to all agencies represented on the Task Force.

7. On March 22, 1968, the Working Group presented its "proposed plan of operation for law enforcement in the event of a major civil demonstration or disorder in the District of Columbia." This plan presented detailed recommendations for mass arrest and detention procedures in the case of a civil disturbance or civil disobedience in the District of Columbia and set forth proposed plans of communications and intelligence, protection of key in-

stallations, arrest policy and procedure, as well as the names and home and office phone numbers of key personnel in each agency. The objective of the plan of operation was "to effect coordination between interested departments and agencies of the Federal Government and the District of Columbia in the critical areas of planning, communications, lines of authority and divisions of responsibilities in maintaining law enforcement in the event of a major civil demonstration or disorder in the District of Columbia."

8. The provisions of the plan as they had been established at that time were summarized as follows:

> Each interested department or agency will establish a command post to be activated in the event of a major civil demonstration or disorder. Key personnel in each department or agency will be designated to be responsible for coordinating law enforcement activities consistent with this plan of operation. During major demonstrations the Department of Justice command post will serve as the center of operations for law enforcement activities. Direct line telephone communications between the Department of Justice command post and other command posts will be established. Existing communications systems between interested departments and agencies also will be used. Key public buildings and public utility installations will be protected. In arrest cases the Metropolitan Police Department will transport and process those arrested. All arrests arising from major demonstrations or disorders will be processed at central cell block and, if necessary, the District Court detention facility. When mass arrests occur or are anticipated, the Metropolitan Police Department will alert the United States Attorney and the Corporation Counsel. Thereafter, the courts and prosecutors will staff according to the needs of the situation. Defense counsel will be available at the central processing detention facility. Central disposition records will be maintained for arrested individuals by the Metropolitan Police Department.

9. On March 29, 1968, a meeting of the Task Force was held in my office to discuss the draft plan developed by the Working Group. At this meeting, there were discussions of some details and of means of effectuating the general recommendations of the working group. On April 2, representatives of the Working Group met with representatives of the District of Columbia Department of Corrections and the Federal Bureau of Prisons to finalize contingent detention plans, including the use of the Occoquan facility staffed by federal personnel in the event of large-scale arrests during a civil disturbance.

10. In addition to working with the Task Force, I also conferred on a number of occasions with David E. McGiffert, then Under Secretary of the Army, who was in charge of another Washington Civil Disturbance Task Force, which had prepared a plan for civil disturbances in the metropolitan Washington area principally directed to the use of federal troops and their relationship with civil authorities. The Task Force headed by Mr. McGiffert also included representatives of the White House, Defense Department, Army, National Guard Bureau, Metropolitan Police, the Criminal Division of the Justice Department, and the District Government.

11. On April 4, 1968 at about 7:30 p.m., I was attending a staff conference in the office of Attorney General Ramsey Clark when we received notification from the Army Operations Center that Dr. Martin Luther King, Jr. had been shot. While there had been some reports of minor disturbances coming into the Information Unit, there had been no word of any serious civil disturbance locally until about 9:30 p.m. I was preparing to go home at that time, when word was received of disorders in the area of Fourteenth Street, N.W. in Washington, D.C. I then remained at the Department to follow developments along with other officials of the Department of Justice.

12. At about 10:20 p.m., Deputy Chief Hughes of the Metropolitan Police Department telephoned to advise that the trouble was subsiding and it appeared to be under control at the moment. However, he advised me that in any event he planned to hold the 4:00 p.m. to midnight

shift on duty, and was calling in the midnight shift an hour early.

13. There was, as is usually true, a serious problem of determining the severity of a disturbance while it is going on, based on the reports received from the various reporting agencies. The reports come from a number of different sources and from different perspectives. The same incident may be described by different people in different ways and occasionally it is difficult to determine whether they are describing the same incident or a series of incidents. Further, reports are frequently received in the wrong time sequence making it difficult to establish a chronology.

14. Attorney General Clark, Deputy Attorney General Warren Christopher and other officials of the Department of Justice remained at the Department throughout the night of April 4-5, 1968. At 3:15 a.m. Thomas J. McTiernan represented the Department of Justice at a meeting held in the Army Operations Center in the Pentagon, to consider the possibility of further disorders on the following day and whether the National Guard should be called out in anticipation of such disorders. At between 4:00 and 5:00 a.m., Attorney General Clark went to Memphis, Tennessee, the scene of the assassination.

15. On the morning of Friday, April 5, I participated in conferences with other Department of Justice officials, including Deputy Attorney General Warren Christopher concerning available police manpower, review of established procedures to meet legal requirements for the use of troops and National Guardsmen, court procedures and other matters included within the Task Force report. I also conferred with officials of the District of Columbia Government, the United States Attorney, the Metropolitan Police and other agencies represented on the Task Force in connection with the arrest and detention plans in case of renewed disturbances in the District of Columbia.

16. I attended a conference shortly after noon on April 5 at the Army Operations Center in the Pentagon. Also attending the conference were Secretary of the Army Stanley R. Resor, Chief of Police, John B. Layton of the

Metrooplitan Police, Major General Southward of the D.C. National Guard, and Major General Charles S. O'Malley, Jr., Commanding General of the Military District of Washington. This meeting was called primarily to discuss and determine the drill status of the District of Columbia National Guard and the alert status of federal troops. Decisions were made to assemble the Guard and advance the alert status of federal troops.

17. That afternoon I returned to the Department of Justice and continued to follow reports from the District of Columbia and around the nation. As the disorders spread in the District of Columbia, and as the number of arrests mounted, it quickly became apparent that the detention facilities and customary booking procedures would be overtaxed. As a result, central booking was instituted to supplement precinct booking, and it was determined that some of those arrested on charges of curfew violations and other violations of a less serious nature would be detained at the Occoquan Detention Center.

18. On Saturday, April 6, the severity of the disorders in Washington had decreased, but the reports showed increasing disorders in Baltimore, Chicago and other cities. Warren Christopher had gone to Chicago on the evening of April 6th as the federal representative to recommend whether troops were needed in that city. In the afternoon of April 7th, I was requested by the Attorney General to proceed to Baltimore to evaluate conditions in that city and recommend to him and the President whether federal troops were necessary. I left for Baltimore by helicopter immediately. I made a personal examination of the riot areas in Baltimore by helicopter and automobile. The President determined to send troops to Baltimore on April 7th, signing the Presidential Proclamation at 10:12 p.m., and the Executive Order at 10:13 p.m. Troops were immediately dispatched to Baltimore. I returned to Washington, D.C. on April 10 or 11, at which time the disturbances in Washington had virtually ceased.

FRED M. VINSON, JR.

DEPUTY CLERK: Arlo Tatum, and others, versus Melvin Laird, and others, Civil Action 459-70.

MR. WULF: Good morning, Your Honor.

THE COURT: Good morning.

MR. WULF: My name is Melvin Wulf, one of the attorneys for the Plaintiffs. We're here on a motion for preliminary injunction in this suit to enjoin the Army from engaging in the collection, storage, and circulation of a large variety of information which we allege is of a constitutional protective nature concerning constitutional protective activity of Plaintiffs in the classes they represent. The Government has filed a motion to dismiss and we are prepared in support of our motion for preliminary injunction to go forward with testimony this morning if the Court is so disposed and we would think that and take the position that it would be to the advantage of the Court if it would hear the testimony before ruling on the Government's motion to dismiss.

THE COURT: Well, why do you need testimony, you've got voluminous affidavits in this case; what would your testimony cover that your affidavits haven't?

MR. WULF: Well, it would supplement the material in the affidavits; but beyond that, the case is now in the posture where the Government alleges it has discontinued the activity which the complaint complains about. However, our complaint is drafted much broader than with respect to the material which the Government claims to have discontinued. We are—we want to show the Court that the res, that the substance of the lawsuit is still in existence and that the Government's assertions about discontinuance are incomplete, that the activity and conduct still goes on in a very, very widespread manner. Our testimony would go to that also, your Honor.

THE COURT: Well, the Government wouldn't want to allege that it has discontinued all of it's activities by any means, would it?—the main contention of the Government is that the activity is proper, whatever it's doing.

MR. WULF: They take that position also. They also do admit that some was either unnecessary, or perhaps, beyond the proper function of the Army and they say they did discontinue particularly two practices, the computer maintained at Fort Holabird United States Army Intelligence Command, and they say they destroyed, or intend to destroy, or rule to destroy, the program for that computer; they've also asserted that they have withdrawn, or intend to withdraw, an identification list which we would like to refer to as the Holabird Black List which is a collection of data about persons engaged in political activity which the Army took the liberty of collecting and putting together in this document. They also made reference to some material collected at the Counter-intelligence Analysis Division which they inferentially said they have not destroyed nor do they intend to, but there is a great deal of other material that is alleged, which we refer to in our complaint and in the subsequent affidavits which contain exactly the same kind of information and which is distributed all over the country at various military installations and about which the Government said nothing at all about any intention to discontinue its collection, or its storage and we can show that the same kind of materials which the Army has confessedly said is beyond its interest or jurisdiction continues to be maintained and stored at other Army installation.

THE COURT: I don't believe in view of all the affidavits in this case that there's any need for any testimony and furthermore, as far as these witnesses are concerned, you have had ample opportunity to get their affidavits already. So I will not permit testimony. Anything else before we start?

MR. WULF: You'll then hear the argument on the motion to dismiss, is that correct, your Honor.

THE COURT: Well, I'll hear both the argument on the motion to dismiss and the argument on your restraining order.

MR. WULF: All right, sir, in that . . .

THE COURT: . . . and since you filed the restraining order first, I'll hear that first.

MR. WULF: In that case, may I move the admission for the purposes of argument on those two matters Professor Frank Askin of the New Jersey Bar who will present the argument on behalf of the Plaintiffs.

(Professor Askin approaching the lectern.)

THE COURT: All right.

MR. ASKIN: Your Honor might I make one other observation in regard to taking testimony this morning, the fact is that the Plaintiffs have brought in a number of witnesses from around the country ready to testify on the preliminary injunction. Of course, it would be appropriate to take their testimony now because it would remain usable under the Federal Rules of Procedure at the final hearing; it would not be necessary to recall them since the witnesses are here and it would seem that it would be appropriate to . . .

THE COURT: Well, Counsellor, as I recall it, the Plaintiffs' Counsel called about this some time ago asked my disposition about taking testimony and I told them that on a motions calendar as such that we only do it when it's absolutely necessary and that they should cover these matters by affidavits. So I think this is no surprise to you. I will not hear witnesses, so you may go ahead.

MR. ASKIN: Yes, your Honor. Are you suggesting that we should then proceed rather than the Government on the motion to dismiss? We should proceed first?

THE COURT: Yes, you filed your motion first, so I'll hear yours first. I shan't rule on it, however, until I hear the other one, too.

Plaintiffs' Argument in Support of the Motion for Preliminary Injunction

MR. ASKIN: Let me proceed, your Honor, by addressing myself to especially the Government's contentions in this case; I think it would be the easiest way in which to lay open before this Court what is really at issue.

The Plaintiffs' complaint and the Plaintiffs' affidavits portray a system that we believe can only be considered disgraceful in the United States of America, a system in which United States military authorities employ hundreds of agents lurking about the country spying on the lawful political activity of American citizens; attending their meetings, on occasion worming their way into the confidence of lawabiding citizens, reporting back their findings to a—some central headquarters of political data-gathering under the Army's command. A teletype network, not . . .

THE COURT: Have they gone into closed meetings, or secret meetings, or anything of that sort?

MR. ASKIN: That's our belief, your Honor.

THE COURT: I don't want your belief, I want your evidence.

MR. ASKIN: Well, we have witnesses here this morning who would be ready to testify to that matter. Now I would have to go back to examine the materials which have already been submitted as to whether or not our affidavits demonstrate that, but we do have witnesses in the Court who are ready to testify to the infiltration.

THE COURT: Why don't you have their affidavits?

MR. ASKIN: Well, your Honor, it was my feeling that on a motion—my original feeling that on a motion for preliminary injunction that it would really be very difficult for the Court to rule on such a momentous question to enjoin—to actually enjoin the Army, which we don't think is to be taken lightly, we would think this would be an important judicial determination. It was my feeling, your Honor, that this really should not be done on the basis of bare, paper testimony, that, in fact the witnesses should be present in Court, should be under

the cross-examination, and should be available for the Court to hear and see. And frankly, your Honor, it was my impression that we would be able to present these witnesses in person.

THE COURT: I think in the future, you'd better follow the direction of the Court and you will get a little further.

MR. ASKIN: Yes, your Honor.

THE COURT: Go ahead.

COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW

THE COURT: The Court holds that what in effect the plaintiffs are complaining of here is that the Army is keeping the type of information that is available to all news media in this country, covered by all news media in this country, and which is in the morgues of the newspapers in this country and magazines, and the Court holds that they state no cause of action; they show no unconstitutional action on the part of the Army; they show no threats to their rights. And I will sustain the motion to dismiss and I will deny the preliminary injunction, it following, of course, if it's acceptable to the motion to dismiss, that the great likelihood of plaintiffs maintaining this action is in the view of the Court zeroed. So I will deny the preliminary injunction and grant the motion to dismiss.

Present an order.

MR. MARONEY: Yes, your Honor.

(Whereupon, Court recessed at 11:12 a.m.)

• • • •

April 29, 1970

The Honorable George L. Hart, Jr.
Judge of the United States
District Court for the
District of Columbia
United States Court House
Constitution Avenue & John
Marshall Place
Washington, D.C. 20001

Dear Judge Hart:

In denying the plaintiffs' motion for a preliminary injunction and in granting the government's motion to dismiss, you directed the government to prepare an order reflecting these decisions.

A week has now passed and the government has still not filed a draft order. We are interested in proceeding in the Court of Appeals as quickly as possible and have taken the liberty of preparing a draft order ourselves. We respectfully request that you sign the enclosed order, thereby permitting us to proceed with our appeal.

Sincerely yours,

LAWRENCE SPEISER
Attorney for Plaintiffs

Enclosure

ORDER

Upon consideration of plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss the complaint, it is

ORDERED that plaintiffs' motion is denied, It is

FURTHER ORDERED that defendants' motion to dismiss is granted on the ground that the complaint fails to state a claim upon which relief can be granted.

_____
JUDGE

DATED: _____

ORDER

This cause having come before the Court on April 22, 1970 on plaintiffs' motion for a preliminary injunction, on defendants' opposition thereto and on defendants' motion to dismiss the complaint filed herein on February 17, 1970, and the Court having considered the pleadings, briefs, and affidavits filed herein, and having heard the oral argument of counsel for the respective parties, and it appearing to the Court that plaintiffs fail to state a claim upon which relief can be granted, show no unconstitutional action and allege no unlawful action on the part of the defendants, show no threats to their rights and present no justiciable controversy, and it further appearing to the Court that the defendants' motion to dismiss the complaint should be granted, it is, therefore, by the Court this 29th day of April 1970;

ORDERED, that the defendants' motion to dismiss be, and the same hereby is, granted and that the action be, and the same hereby is, dismissed with prejudice; and it is

FURTHER ORDERED that plaintiffs' motion for a preliminary injunction be, and the same hereby is, denied as moot.

UNITED STATES DISTRICT JUDGE

NOTICE OF APPEAL

Notice is hereby given this 23rd day of April, 1970, that Plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22nd day of April, 1970 in favor of Defendants against said Plaintiffs.

LAWRENCE SPEISER
Attorney for Plaintiffs
American Civil Liberties Union
1424 Sixteenth Street, N.W.
483-3830

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,203

ARLO TATUM, CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS, ET AL., APPELLANTS

v.

MELVIN B. LAIRD, SECRETARY OF DEFENSE, ET AL.

Appeal from the United States District Court for the District of Columbia

Decided April 27, 1971

[Judgment entered this date]

Mr. Frank Askin, of the bar of the Supreme Court of New Jersey, *pro hac vice*, by special leave of Court, with whom *Messrs. Melvin L. Wulf* and *Lawrence Speiser* were on the brief, for appellants. *Mrs. Hope Beth Eastman* also entered an appearance for appellants.

Mr. Robert L. Keuch, Attorney, Department of Justice, with whom *Messrs. J. Walter Yeagley*, Assistant Attorney General at the time the brief was filed, *Kevin T. Maroney* and *George W. Calhoun*, Attorneys, Department of Justice, were on the brief, for appellees. *Mr. Benjamin Flannagan*, Attorney, Department of Justice, also entered an appearance for appellees.

Before TAMM, MACKINNON and WILKEY, *Circuit Judges*.

Opinion filed by WILKEY, *Circuit Judge*.

Opinion filed by MACKINNON, *Circuit Judge*, concurring in part and dissenting in part.

WILKEY, *Circuit Judge*: On 17 February 1970 appellants, on behalf of themselves and others similarly situ-

ated, filed suit challenging the legality of what appellants term "surveillance of lawful civilian political activity by the U.S. Army," which appellees describe as "gathering by lawful means, . . . maintaining and using in their intelligence activities, any information relating to potential or actual civil disturbances [or] street demonstrations." Appellants sought a declaratory judgment that the Army's present conduct is unconstitutional or otherwise illegal, concomitantly an injunction forbidding future similar activity, and the destruction of all such data hitherto illegally obtained. The United States District Court denied the requested relief and granted appellees' motion to dismiss on the basis of pleadings, affidavits, and oral argument, without testimony of witnesses.

Appellants claim that the Army's intelligence work involves undercover operations by military agents within the civilian community and organizations, maintenance of records at over a dozen regional and national record centers, and distribution of military units and to criminal investigative agencies of lists describing individuals and organizations who have publicly objected to governmental policies. Appellants claim that these domestic activities of the Army go far beyond any legitimate military need, exceed the Army's statutory authority, inhibit political participation and debate, and deprive appellants and others similarly situated of the constitutional rights guaranteed by the First, Fourth, Fifth and Ninth Amendments, *i.e.*, the right to free speech and association, and the right to petition the government for redress of grievances, and the right of privacy.

Appellees assert the constitutional and statutory authority and duty of the President to use such of the Armed Forces as he deems necessary to suppress any insurrection or domestic violence, and point to Defense Department directives regarding the planning for and employment of military resources in the event of civil disturbances, under which one of the responsibilities of the Army is to provide "essential planning, operational and intelligence data to the national military command center and to military service command centers on a timely basis to insure that the national command authorities and ap-

propriate military service command authorities are adequately informed."

For reasons stated hereafter, we find that this court and the District Court have jurisdiction, that there is a justiciable controversy, and that appellants have stated a claim in relation thereto. We therefore remand the case to the District Court for ascertaining essential relevant facts and the determination thereupon of whether any rights of the appellants have been infringed by any actions of the appellees which may be proved.

I. JURISDICTION

Appellants' complaint in the District Court alleged jurisdiction to be based upon the existence of a federal question as contemplated by 28 U.S.C. § 1331, and the requisite $10,000 in controversy. On this appeal [1] the Government contents the allegation of jurisdictional amount, contending that:

> There is no evidence in the record that any of the plaintiffs have a claim in fact for any amount of money, much less a claim for an amount in excess of $10,000.

In response to this argument, appellants in essence admit that their claim is not capable of valuation in monetary terms, but argue essentially that where a challenge to a claimed deprivation of fundamental constitutional rights of intangible value is involved, the purposes for the jurisdictional amount requirement [2] are inapplicable and

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[1] No claim of lack of subject matter jurisdiction was raised in the Government's motion to dismiss in the District Court. This, of course, is no bar to the raising of the issue on appeal. *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908).

[2] The purposes of the jurisdictional amount requirement are, appellants assert, twofold: first, the promotion of federalism by confining federal courts strictly within the limits of their jurisdiction as prescribed by Congress; and, second, the avoidance of consuming the resources of the federal courts in the resolving of "petty" controversies. *See Healy* v. *Ratta*, 292 U.S. 263 (1934), and S. Rep. No. 1830, 85th Cong., 2d Sess. (1958). Neither of these purposes, appellants insist, would be served by denying jurisdiction in the instant case.

that such requirement should therefore not be applied to defeat federal jurisdiction. While there have been mounting expressions of judicial concern over this seeming gap, caused by the jurisdictional amount requirement, in the power of the federal courts to entertain federal question cases of this nature, we find it unnecessary to reach this question in the instant case.[3]

As we recently held in *Peoples* v. *United States Department of Agriculture*:[4]

> The District Court for the District of Columbia has an independent source of jurisdiction in the legislation, passed by Congress, and codified in the District of Columbia Code, 11 D.C. Code § 521, which gives that court general equity jurisdiction, and venue where either party is a resident or found within the District of Columbia. This permits actions for declaratory judgment as well as injunction to be maintained against those whose office in the Federal Government establishes their official residence in the District. *Stark* v. *Wickard*, 321 U.S. 288, 64 S.Ct. 559,

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[3] *See Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 826 (2d Cir. 1967); *Fein* v. *Selective Service System Local Board No. 7*, 430 F.2d 376, 380 (2d Cir. 1970) (dissenting opinion); *Giancana* v. *Johnson*, 335 F.2d 366, 371 (7th Cir. 1965) (dissenting opinion); *Murray* v. *Vaughn*, 300 F. Supp. 688 (D.R.I. 1969); *Boyd* v. *Clark*, 287 F. Supp. 561, 567 (S.D.N.Y. 1968) (dissenting opinion). The American Law Institute has recommended the abolition of the amount in controversy requirement in federal question cases precisely because:

> The few cases that are . . . that must satisfy the § 1331 requirement are likely to involve matters particularly deserving of a federal forum. . . . Cases in which the plaintiff claims violation of his constitutional rights by action of a federal official warrant federal cognizance without the need of demonstrating that the requisite amount is in controversy.

ALI, Study of the Division of Jurisdiction Between State and Federal Courts, 172 (1969). *See also* C. WRIGHT, FEDERAL COURTS, § 32 at 110 (1969); Currie, *The Federal Courts and the American Law Institute* (Part II), 36 U. CHI. L. REV. 268, 292 (1969).

[4] 138 U.S. App. D.C. 291, 294, 427 F.2d 561, 564 (1970).

88 L. Ed. 733 (1944); *Nestor* v. *Hershey*, 425 F.2d 504, at 521-523 (Dec. 16, 1969).[5]

Furthermore, we note that since the Government did not contest the existence of the alleged jurisdictional amount in the District Court, appellants had no opportunity to attempt to sustain their allegation that $10,000 was in controversy, an endeavor at which they might well be successful under the doctrine that, particularly where

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[5] Where a suit seeks equitable relief, and no claim involving personal property, or for debt or damages is made, the District Court for the District of Columbia has "original jurisdiction" without regard for the amount in controversy. *See Norden* v. *Royall*, 90 F. Supp. 834, 835 (D.D.C. 1949); *Patton* v. *District of Columbia*, 180 A.2d 844 (D.C. Mun.App. 1962); *Friedman* v. *District of Columbia*, 155 A.2d 521 (D.C. Mun. App. 1959); Byse & Fiocca, *"Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 325 (1967); 11 D.C. Code §§ 521, 961. Of course, when the District Court entertains such a suit it is exercising powers analogous to those of a state court of general jurisdiction. *Western Urn Mfg. Co.* v. *American Pipe and Steel Corp.*, 109 U.S. App. D.C. 145, 284 F.2d 279 (1960); *King* v. *Wall & Beaver Street Corp.*, 79 U.S. App. D.C. 234, 145 F.2d 377 (1944); *Boardman* v. *Martocchia*, 216 F. Supp. 830 (D.D.C. 1963). And it is unclear whether such a state court would have the power to issue an injunction against a federal officer. *See* Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L. J. 1385 (1964). Nevertheless, it is clear that the reasons creating the doubt as to state courts' power in this respect, stemming from considerations of federal supremacy, do not apply to the District Court for the District of Columbia, which is itself a constitutionally based Article III federal court, albeit one additionally endowed with unique general powers, pursuant to Article I, § 8. *See O'Donoghue* v. *United States*, 289 U.S. 516 (1933).

The foregoing analysis is not affected by the enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358 (29 July 1970) 84 Stat. 473, Title I of which establishes the new Superior Court of the District of Columbia as a court of general jurisdiction equivalent to a state court of similar powers. The instant suit was filed before the 1 February 1971 effective date of the new Act, and therefore properly remains within the jurisdiction of the United States District Court as provided by prior law. District of Columbia Court Reorganization Act of 1970, § 111, 84 Stat. 476, *to be codified as* D.C. CODE ANN. § 11-501(1). *See* Williams, *District of Columbia Court Reorganization, 1970*, 59 GEO. L. J. 483, 540-542 (1971).

purely injunctive relief is sought, the amount in controversy may be measured by either "the value of the right sought to be gained by the plaintiff . . . [or] the cost [of enforcing that right] to the defendant . . . ." [6] In the instant case, it seems likely that if all the relief sought by appellants were granted, including enjoining the operation of the Army's civilian intelligence system and the production and destruction of all records pertaining thereto "maintained by any and all military agencies within the United States and overseas," the cost to the Army of complying with such a decree might well exceed $10,000.

Thus even apart from the applicability of 11 D.C. Code

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[6] *Hedberg* v. *State Farm Mutual Automobile Ins. Co.*, 358 F.2d 924 (8th Cir. 1965) (Blackmun, J.) (dictum). A succinct and oft-quoted statement of this doctrine was put forth by the 10th Circuit in *Ronzio* v. *Denver & R. G. W. R.R.*, 116 F.2d 604, 606 (10th Cir. 1940), as follows:

> In determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiffs' complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce.

See Hatridge v. *Aetna Casualty & Surety Co.*, 415 F.2d 809, 814-16 (8th Cir. 1969). *Compare* C. WRIGHT, FEDERAL COURTS, § 34, 117-19 (1969), where the rule allowing the cost to the defendant to be considered is stated to be the "desirable" one, *with* J. MOORE, FEDERAL PRACTICE ¶ 0.9[1] (2d ed. 1964), where the rule is characterized as "contrary" to the prevailing view. While the Supreme Court has never directly passed on this question, *compare St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938), *with Horton* v. *Liberty Mutual Ins. Co.*, 367 U.S. 348 (1961), a number of lower federal courts have permitted the cost to the defendant to control the jurisdictional amount issue, *see* cases cited in WRIGHT and MOORE, *supra*. And the Supreme Court's willingness to entertain, without discussion of the jurisdictional basis, the appeal of a federal taxpayer seeking to enjoin the operation of portions of the federal Elementary and Secondary Education Act of 1965 as violating the Establishment and Free Exercise Clauses of the First Amendment, *Flast* v. *Cohen*, 392 U.S. 83 (1968), may well be indicative of the Court's view that jurisdictional amount may appropriately be established from the defendant's viewpoint in certain cases. The Court in *Flast*, in its discussion of the standing issue, noted that "the challenged program involves a substantial expenditure of federal tax funds," 392 U.S. at 103, while nowhere mentioning any alleged monetary value of the plaintiff's claim.

§ 521, since we have found as detailed subsequently that appellants have otherwise stated an adequate and justiciable claim for relief, we would be constrained to permit appellants on remand the opportunity to meet their burden of satisfying the District Court that the requisite amount is in controversy.[7]

For the foregoing reasons we reject the Government's claim that the dismissal should be affirmed for lack of subject matter jurisdiction.[8]

II. JUSTICIABLE CONTROVERSY

In recent years the Army and the National Guard have been called upon to act to preserve domestic peace against violent protests leading to civil disorders, a role for the military which was not unforeseen in our Constitution.[9] Many violent protests were aimed directly at military functions

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[7] *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1935). In establishing that the amount in controversy exceeds $10,000, "[a]bsolute certainty . . . is not essential. . . . Present probability that [the cost to the defendant] will exceed that sum is enough." *Friedman* v. *International Association of Machinists*, 95 U.S. App. D.C. 128, 220 F.2d 808 (1955).

[8] Appellants' complaint did not refer to 11 D.C. CODE § 521 as a basis for jurisdiction of their claim. However, at argument, appellants moved pursuant to 28 U.S.C. § 1653 to amend their complaint to include § 521 in their jurisdictional allegations. Section 1653 provides as follows: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." Under this section, "either this Court or the District Court on remand, has power to permit amendment to avoid dismissal under jurisdictional grounds." *Jones* v. *Freeman*, 400 F.2d 383, 387 (8th Cir. 1968). The statute is to be construed liberally in accordance with the congressional intent to provide a means for avoiding the dismissal of suits on technical grounds. *John Birch Society* v. *National Broadcasting Co.*, 377 F.2d 194 (2d Cir. 1967); *Moore* v. *Coats Co.*, 270 F.2d 410 (3rd Cir. 1959). Accordingly, we direct that upon remand of this action appellants be permitted to amend their complaint to allege jurisdiction resting upon 11 D.C. Code § 521.

[9] U.S. CONST. art. I, § 8, cl. 14, 15, 16; art. II, § 2, cl. 1; art. 4, § 4. Article I, § 8 assigns the Power to Congress to define the role of the military in national affairs. The military must therefore confine its activities to those necessary to carry out its functions provided by statute.

and installations themselves, as in ransacking Selective Service offices, barring troop and supply trains by prostrate bodies on the tracks, unlawful attempts to enter military bases or demonstrations thereon, and harassment of defense-oriented businesses. In executing other missions the Army confronted riotous mobs protesting matters unrelated to military operations, for example, the tragic riots in Detroit, Newark, and other of our large cities. During the period 1967-1968 the National Guard was called upon eighty-three times and the Army four times to quell cases of civil disorder.

While these statistics relate to the period of civil disorders during which the Army operated the intelligence system which appellants complain violated their rights, we also note that in the period beginning with the use of the Army paratroops at Little Rock in 1957 the Army has been called upon under related constitutional and statutory provisions to preserve civil peace in order that certain groups might exercise their constitutional rights. The moral of this is that no matter who the persons or groups are giving voice to their protests against the established order, civil disturbance of one kind or another is likely to ensue; and, irrespective of the content or cause of the protest, the military need certain intelligence information to perform their mission "to enforce the laws of the United States" or "suppress . . . insurrection." [10]

In performing this type function the Army is essentially a police force or the back-up of a local police force. To quell disturbances or to prevent further disturbances the Army needs the same tools and, most importantly, the

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[10] 10 U.S.C. §§ 331, 332, 333 (1964). We note, however, that the operation of the intelligence system challenged herein is not sought to be justified by any need to obtain information for the use of the National Guard. At oral argument appellees admitted that no such information has been provided to the Guard on the occasions of its deployment during 1967-68, and would not be provided unless the Guard were called into federal service. With respect to the use of the Guard in Federal service, article 1, § 8, cl. 15 of the Constitution empowers Congress "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

same information to which local police forces have access. Since the Army is sent into territory almost invariably unfamiliar to most soldiers and their commanders, their need for information is likely to be greater than that of the hometown policeman.

No logical argument can be made for compelling the military to use *blind* force. When force is employed it should be intelligently directed, and this depends upon having reliable information—in time. As Chief Justice John Marshall said of Washington, "A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information; . . . ." [11] So we take it as undeniable that the military, *i.e.*, the Army, need a certain amount of information in order to perform their constitutional and statutory missions.[12] The questions are what type of information the military need, how they should go about obtaining it, when they need it, and whether what the Army has done here has infringed any of appellants' rights.

So much for the military's mission and intelligence necessity. As for appellants' contention that their rights, constitutional or otherwise, have been infringed, they have some difficulty in establishing visible injury, at least on this incomplete record. Appellants freely admit that they complain of no specific action of the Army against them, only the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies. There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military

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[11] Foreword, U.S. ARMY BASIC FIELD MANUAL, Vol X, circa 1938.

[12] The President's National Advisory Commission on Civil Disorders recommended:

> Intelligence—The absence of accurate information both before and during a disorder has created special control problems for police. Police departments must develop means to obtain adequate intelligence for planning purposes, as well as on-the-scene information for use in police operations during a disorder.

agent. So far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand.

Thus the instant case, at this juncture, involves no concrete, identifiable sanctions, no compelled self-identification (except to the extent that the Army may attend meetings thought to be for a faithful few), and no threat of publication. Turning to the authorities claimed to be relevant here, virtually all of the First Amendment cases cited where government activity was enjoined or struck down fall into one of three categories:

> (1) Cases where some legal or criminal sanction was imposed or threatened to be imposed on persons who exercised their First Amendment rights.[13]
>
> (2) Cases involving some element of government compulsion, either to testify regarding one's political ideas or beliefs, or to identify oneself in order to exercise First Amendment rights.[14]
>
> (3) Situations where the Government threatens to publicize the names of allegedly politically controversial persons for the purpose of inhibiting the exercise of their first Amendment rights.[15]

In view of the distinctions in this case from prior decisions, appellees argue that no justiciable controversy ex-

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[13] *E.g., United States* v. *Robel*, 389 U.S. 258 (1967) (criminal prosecution or loss of employment); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) (criminal prosecution); *NAACP* v. *Button*, 371 U.S. 415 (1963) (criminal prosecution, disbarment); *National Student Association* v. *Hershey*, 134 U.S. App. D.C. 56, 412 F.2d 1103 (1969) (draft reclassification).

[14] *E.g., Lamont* v. *Postmaster General*, 381 U.S. 301 (1965) (compelling affirmative act of requesting delivery of mail thought by the Post Office to be communist propaganda); *Talley* v. *California*, 362 U.S. 60 (1960) (requiring identity on political handbill); *NAACP* v. *Alabama*, 357 U.S. 449 (1958) (requiring filing of membership lists); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), and *Watkins* v. *United States*, 354 U.S. 178 (1957) (compelling testimony).

[15] *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C. 1970).

ists, *i.e.*, that nothing has been done, that nothing is contemplated to be done, and even if some action by the Army against appellants were possibly foreseeable, such would not present a presently justiciable controversy.

This position of the appellees does not accord full measure to the rather unique argument advanced by appellants. While appellants do indeed argue that in the future it is possible that information relating to matters far beyond the responsibilities of the military may be misused by the military to the detriment of these civilian appellants, yet appellants do not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground. Rather, appellants contend that the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on appellants and other persons similarly situated which exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights of free speech, etc. The baleful effect, if there is one, is thus a present inhibition of lawful behavior and of First Amendment rights.[16]

Under this view of appellants' allegations, under justiciability standards[17] it is the operation of the system

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[16] "The peculiar feature of suits alleging a First Amendment chilling effect . . . is that if the allegation is correct, immediate and real injury is done to the plaintiff's interest if he *does not* speak or act as he says he wants to." *National Student Association* v. *Hershey*, 134 U.S. App. D.C. 56, 64, 412 F.2d 1103, 111 (1969). If the Army's intelligence system causes such injury it may be enjoined if the system in operation exceeds the authority granted by Congress, *see Kent* v. *Dulles*, 357 U.S. 116 (1958) and notes 9 and 10, *supra*, or, if within its statutory authority, it nevertheless creates more than an "incidental" burden on First Amendment Rights, and thus violates the Constitution. *See United States* v. *O'Brien*, 391 U.S. 376 (1968).

[17] To "allege the sort of 'case' or 'controversy' referred to in Article III of the Constitution, the source of jurisdiction of the federal courts, . . . the complaint must show that there exists a controversy between the parties with such immediacy and presently adversary character as to require its adjudication." *Davis* v. *Ichord*, No. 23, 426 (D.C. Cir. 20 Aug. 1970).

[Footnote continued on page 140]

[11][Continued]

To the extent that the Army's argument against justiciability here includes the claim that appellants lack standing to bring this action, we cannot agree. If the Army's system does indeed derogate First Amendment values, the appellants are persons who are sufficiently affected to permit their complaint to be heard. The record shows that most if not all of the appellants and/or the organizations of which they are members have been the subject of Army surveillance reports and their names have appeared in the Army's records. Since this is precisely the injury of which appellants complain, they have standing to seek redress for that alleged injury in court and will provide the necessary adversary interest that is required by the standing doctrine, on the issue of whether the actions complained of do in fact inhibit the exercise of First Amendment rights. Nor should the fact that these particular persons are sufficiently uninhibited to bring this suit be any ground for objecting to their standing. *See N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 459 (1958); *Anderson* v. *Sills*, 56 N.J. 210, 265 A.2d 678, 684 (1970).

Nor does the recent group of Supreme Court decisions limiting the situations in which federal courts may enjoin court criminal proceedings require a different result. *See Younger* v. *Harris*, —— U.S. —— (1971) (39 U.S.L.W. 4201), *Boyle* v. *Landry*, —— U.S. —— (1971) (39 U.S.L.W. 4207) (23 Feb. 1971), and related cases decided the same day. Those cases rest firmly on concepts of Federalism and comity not present in the instant appeal. In *Younger* where certain of the plaintiffs sought standing to attack alleged unconstitutional state statutes on First Amendment grounds, because they claimed to "feel inhibited" by the existence of such laws, the Court stated:

> We do not think this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to *enjoin a pending state prosecution*. A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs *in such cases*. (Emphasis added.)

The Court went on to hold that even one who has been indicted under a constitutionally suspect state law may not ordinarily seek federal injunctive relief because of the "long standing public policy against federal court interference with state court proceedings . . . ." And in *Boyle*, where "[n]ot a single one of the citizens who brought [the] action had ever been prosecuted, charged, or even arrested under the particular . . . statute which the court below held unconstitutional," the Supreme Court relief on its discussion of the requirements of Federalism in *Younger* to conclude that:

[Footnote continued on page 141]

itself which is the breach of the Army's duty toward appellants and other civilians.[18] The case is therefore ripe

[17][Continued]

the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. *The policy of a century and a half against interference by the federal courts with state law enforcement* is not to be set aside on such flimsey allegations as those relied upon here. (Emphasis added.)

Aside from the fact that, as we have related *supra*, appellants here complain of present injury and not merely speculative future injury, we are not faced in this case with any considerations similar to the policy against federal interference in state court actions which the Supreme Court found controlling in *Younger* and *Boyle*. Furthermore, and highly important here, appellants do not have the "adequate remedy at law" available to the plaintiffs in *Younger* and *Boyle*, in the form of the opportunity to present their constitutional claims to the state court, which the Supreme Court also relied on as a basis for restricting the exercise of federal equitable jurisdiction in such cases.

[18] The analysis of justiciability questions in terms of whether there has been a breach of a judicially identifiable "duty" stems from the Supreme Court's discussion in *Baker* v. *Carr*, 369 U.S. 186, 198 (1962), and *Powell* v. *McCormack*, 395 U.S. 486, 517 (1969). In the latter case the Court, quoting in part from *Baker*, said:

> In deciding whether a claim is justiciable, a court must determine whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."

The Army has both a duty not to exceed its statutory authority and not to infringe first Amendment rights. Appellants claim the Army is doing both; their claim is therefore now justicable, since "the facts alleged, under all the circumstances show that there is a substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant" judicial resolution. *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969), quoting from *Maryland Casualty Co.* v. *Pacific Oil Co.*, 312 U.S. 270, 273 (1941). That the Army has a legitimate need for certain information need not be denied. The claim here is that in the operation of its intelligence system the Army has gone beyond any legitimate need for information, and in doing so has created a present chilling effect on the "transcendent" values enshrined in the First Amendment. *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). *See* note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808,

for adjudication. Because the evil alleged in the Army intelligence system is that of overbreadth, *i.e.*, the collection of information not reasonably relevant to the Army's mission to suppress civil disorder,[19] and because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action, the issue can be considered justiciable at this time.

Only recently this court decided *Davis* v. *Ichord*, in which an attack was made on the maintenance and potential use of files on political dissenters by the House Internal Security Committee. This court there held that no case or controversy was presented because the appellants had failed to establish standing to attack the present use of the files and did not show any concrete indication that the Committee's files would be used against anyone in

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809 (1969) for a discussion of the "substantive" significance of the chilling effect doctrine as relied upon by appellants here. The "judicial determination" of this alleged breach of duty is attainable by identifying those areas in which the Army's activity goes beyond that reasonably relevant to its statutory mission requirements, assuming, of course, that limitation of the Army's system to the extent found reasonably relevant to its civil disorder mission would not itself represent a significant intrusion into protected First Amendment area. *Cf. United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). That this latter assumption is likely to be valid is seen from documents in this record indicating that the Army may have modified its policy and now views its information requirements as limited to "reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and the National Guard to control." Letter from Under Secretary of the Army Thaddeus R. Basil to Senator Sam J. Ervin, 20 March 1970 (App. 84, 88). In spite of this recent self-limitation, however, appellants have alleged the actual operation of a system of much broader scope and, further, that previously collected information is still retained in various Army files. We therefore think that the appellants should be allowed to develop fully their contention that the Army collects and maintains information on civilian political activity in excess of its mission requirements, and the Army should have the opportunity to show the relevance of its intelligence data to its civil disorder mission.

[19] "The free exercise of First Amendment rights is perhaps more readily inhibited by a [policy] justifiably suspect as vague or overbroad, because of the uncertainty of its application. . . ." *Davis* v. *Ichord*, No. 23,426 (D.C. Cir. 20 Aug. 1970) (slip op., at 14).

future. Nevertheless, this court in *Davis* did indicate that "among the considerations pertinent to determining the existence of a chilling effect upon the exercise of First Amendment rights which give rise to a case or controversy are the *source of the chill*, the extent to which it focuses upon the conduct of those who allege it, and the likelihood that it will affect that conduct." The court in *Davis* was concerned with the "source of the chill" in order to determine whether the threat of *future* injury was sufficiently substantial to provide the necessary ripeness to the controversy.

Nevertheless, in view of this country's long-established tradition against military involvement in civilian politics, we think it significant that here the "source of the chill" is the Army, as opposed to the situation in *Davis* where the House Committee could point to a legal basis for the collection of such files pursuant to its designated function to investigate propaganda. We think the Army has a legal basis for the collection of intelligence information relevant to its constitutional and statutory mission, but on the record before us we cannot say that the intelligence system as designed and operated does not go beyond that which would be justified by the Army's mission. The Army system here is apparently of a much broader scope than the files involved in *Davis*, and we held in *National Student Association* v. *Hershey*[20] that "the severity and scope of the alleged chilling effect on First Amendment freedoms" is a factor to be considered in determining justiciability. It is arguable that the existence of a system with the broad scope as alleged by appellants would affect the conduct of persons in the class that appellants claim to represent.[21]

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[20] 134 U.S.App.D.C. 56, 68, 412 F.2d 1103, 1115 (1969).

[21] The dissent suggests that the instant suit may not be appropriate for treatment as a class action under Rule 23, Fed. R. Civ. P. While we recognize that the nature of the appellants' claims and the potentially large number of persons they propose to represent pose difficult questions as to the amenability of their claims to Rule 23 treatment, this question was not considered by the trial court, has not been argued by the parties, and is not presented in the instant appeal. We therefore do not pass on it here. On re-

Referring to our holding in *Davis* that the "source of the chill' is important in determining whether there is any inhibiting effect on the exercise of First Amendment rights, we think that there is a significant difference between investigative actions taken by a military agency in reference to civilians and similar investigative actions taken by a regular investigative agency of a civilian branch of the Government.[22]

One of the functions of a civilian investigative agency, such as the Federal Bureau of Investigation, is to com-

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mand, the trial court will have the opportunity, illuminated by the arguments of the parties, to determine to what extent the class treatment of appellants' claims is appropriate. In this connection we note the considerable flexibility afforded the trial judge under Rule 23 to treat the suit as a partial class action (Rule 23(c)(4)(A)), establish subclasses (Rule 23(c)(4)(B)), and to defer final decision on class action issues until after discovery or further development of the factual bases for the claims alleged. *See* 3B J. MOORE, FEDERAL PRACTICE, ¶ 23.45[1] at 23-707 (1969). This latter course would seem particularly appropriate here, where because of the very nature of the system alleged to be the cause of the complained of injury, the full facts with respect to the scope of its operation and the numbers of persons affected thereby, are, at the present state of the proceedings, primarily within the exclusive knowledge of the defendants.

We further note, in response to the concerns expressed by the dissent, that the fact that a proposed class contains a great number of members does not itself necessarily preclude class action treatment, *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), nor, in suits seeking injunctive or declaratory relief, is the court necessarily required to look into the particular circumstances of each member of the proposed class in determining whether class action treatment is appropriate. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968).

[22] On oral argument counsel for appellants admitted that there is a material difference in the impact of the same intelligence gathering and distribution, depending on whether it is performed by the military or by civilian investigative agencies such as the FBI. Counsel was unwilling to concede that, as to content, any of the information complained of could be compiled by either type agency, not even to the extent of compiling a list of previously convicted fomenters of civil disturbance; and as to time, counsel asserted that such information as was compiled should be given on the spot to the military force by a civilian agency. So extreme a limitation on the gathering and timely dissemination of any information would render it useless.

pile information on law violators, agitators of violence, and possible subversives. It has always been recognized that this is a delicate function, and it is exercised under the direction of the Attorney General. Investigation is performed by men a majority of whom are lawyers or who have had considerable legal training, under the direction of lawyers in the Justice Department, and the information compiled is only usable and effective through court action. The FBI is powerless to imprison anyone or to affect his liberty in any way except through the action of the courts.

The Army or other military, in contrast, are not concerned with law violations. And, in sharp distinction to the FBI and other investigative agencies, they definitely command their own force to exercise at the will of their own commanders. The military are not accustomed to effecting their will through courts and legal processes. Indeed, the employment of military personnel in civil disorders itself implies at least a partial breakdown of law and order, a breakdown of normal processes of law through courts.

The compilation of data by a civilian investigative agency is thus not the threat to civil liberties or the deterrent on the exercise of the constitutional right of free speech that such action by the military is, because a civil investigative agency has no inherent power to act against an individual, that power always being subject to the well-defined restrictions of law and the approval of the courts. The military have no such restrictions; they have their own force (of incomparable power), they have their own commanders trained as soldiers not lawyers, the military's vast size may make civilian control of individual or small unit actions more theoretical than actual, and the military is not accustomed to operating within the restrictions of law and the processes of courts.[23]

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[23] *Cf. National Student Association* v. *Hershey*, 134 U.S. App. D.C. 56, 71, 412 F.2d 1103, 1118 (1969), where, in a suit challenging a Selective Service policy as inhibitive of First Amendment rights we said:

> It is no reflection on the competence or integrity of selective service personnel to observe that they are ill-equipped to deter-

It is highly important for the safety of the country that to the extent consonant with the performance of the military's mission a separation of sensitive information and military power be maintained, as a separation of match and powder. In an emergency or anticipation of an emergency the military power can be supplied the necessary information from civilian investigative agencies; these two ingredients, potentially dangerous when combined, can be put together by a responsible President and his Cabinet officers as the emergency demands. But to permit the military to exercise a totally unrestricted investigative function in regard to civilians, divorced from the normal restrictions of legal process and the courts, and necessarily coupling sensitive information with military power, could create a dangerous situation in the Republic.

The appellants have not had an opportunity to establish (and may never establish) their far-sweeping claims as to the character of the information gathered and the operation of the system established by the Army. We were informed by appellees' counsel on oral argument that on 6 March 1970 the Secretary of the Army by directive to the Chief of Staff limited the intelligence activities here complained of and directed the personnel responsible to concentrate on the more important and likely sources and locales of violence. Apparently in the judgment of the civilian head of the Army not everything being done in the operation of this intelligence system was necessary to the performance of the military mission. If the Secretary of the Army can formulate and implement such judgment based on facts within his Departmental knowledge, the United States District Court can hear evidence, ascertain the facts, and decide what, if any, further restrictions on the complained-of

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mine questions of law as delicate and complex as those commonly raised by anti-war protest activity. Draft boards do not employ judicial procedures, and their members often have no legal training. Rightly or not, registrants are also likely to have less confidence in the constitutional sensitivity of their draft borad, especially in the area of war dissent, than in that of the prosecutor and the courts.

activities are called for to confine the military to their legitimate sphere of activity and to protect appellants' allegedly infringed constitutional rights. Appellants have, therefore, stated a claim upon which relief can be granted.

III. REMAND

Having found that this court and the District Court have jurisdiction, that a justiciable controversy exists, and that appellants have stated a claim upon which relief could be granted, we think the record now before us is much too incomplete for a court to determine the ultimate questions of whether the Army has infringed any rights of the appellants and whether appellants are entitled to any injunctive relief. We therefore remand the case to the District Court for the determination of the following principal (and any related) points:

1. The nature of the Army domestic intelligence system made the subject of appellants' complaint, specifically the extent of the system, the methods of gathering the information, its content and substance, the methods of retention and distribution, and the recipients of the information.

2. What part, if any, of the Army domestic intelligence gathering system is unrelated to or not reasonably necessary to the performance of the mission as defined by the Constitution, statutes, military regulations, and as interpreted by actions under those written definitions of the mission.[24]

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[24] *Cf. Anderson* v. *Sills*, 56 N.J. 210, 265 A.2d 678, 689 (1970), where the New Jersey Supreme Court reversed a lower court decision enjoining the statewide operation of a civil disorder intelligence system by the New Jersey State Police. The court there held that the operation of the intelligence system was at least partly pursuant to a valid governmental interest and should not have been enjoined by the trial court in a summary judgment proceeding. Rather, the court held that a full hearing should be conducted to determine whether the scope of the challenged intelligence system was overbroad in view of both the legitimate state interest in collecting information for planning for and preventing civil disorders and the possible burden on the exercise of First Amendment

3. Whether the existence of any overbroad aspects of the intelligence gathering system, as determined above, has or might have an inhibiting effect on appellants or others similarly situated.

4. Such relief as called for in accordance with the above established law and facts.

Reversed and Remanded.

MACKINNON, *Circuit Judge*, concurring in part and dissenting in part: While I concur in many of the pronouncements in the majority opinion I respectfully dissent from the result. My opinion is based on the facts of the case which emerge from the pleadings, affidavits and the admissions made to the trial court. In the hearing before the trial judge, counsel admitted that in the facts upon which they based their complaint the named plaintiffs were not aggrieved by the acts of the appellees:

> Our Plaintiffs this morning, for example, are *not people, obviously, who are cowed and chilled*; they've come into Court, but they have to represent millions of Americans not nearly as forward, as courageous, as willing as them to open themselves up to public investigation and public scrutiny. We're not—you

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freedoms involved. With regard to its remand order, the court stated:

> In short, if it should be found that the police are gathering information which they could not reasonably believe to be relevant to the police function . . . and that circumstances warrant judicial intervention on that account, the injunctive order must be precisely limited to the offending material or practice. The order must not interfere with police activity that is proper, either in direct terms or because of the vagueness of the restraint.

A similar evaluation must be made in the instant case, with due account given to the differences in function and role between the police and the Army, in dealing with and seeking to prevent civil disorder, and relief, if any, should be appropriately tailored so as not to interfere with legitimate Army activity.

> know, every citizen is not a Tom Payne; they're few and far between.

Tr. 17 (emphasis added).

This admission that the governmental activities they attack did not cause any substantial infringement of their constitutional rights constitutes a basic denial of practically their whole case. There still remains the allegation that the existence of the files and information operates to deny them their constitutional right of association with others who are chilled, but the chill to this amorphous group in turn is grounded in the unrealistic and speculative fear that the Government will improperly use the information against them.[1] The critical information relates to reports of public activities of individuals who *publicly* participate in gatherings and demonstrations which tend to civil disorders and in related activities.[2]

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[1] As the majority points out, appellants vigorously assert that they are not here attacking the legality of the many uses the Army might make of the information it is presently gathering; they are not basing their complaint on the possibility of future injury. Rather they assert that the present inhibitory effect of the Army's surveillance system is the only injury about which they complain; the nature of the sanctions which might be imposed on them at some future time are to them here irrelevant.

To my mind, this attempted distinction is untenable. Any present inhibition which they suffer must be based wholly on a fear, specific or general, of future consequences stemming from use of the Army's information. At the same time, they have alleged no present use, preparation for use or selectivity in gathering information by the Army which would reasonably justify such fears. This is not a situation comparable to the one facing the Court in Lamont v. Postmaster General, 381 U.S. 501 (1965), where, in order to receive certain mail, a person was required to tell the Government that he desired to receive "communist propaganda" or in Shelton v. Tucker, 364 U.S. 479, 486 & n.7 (1960) where there was a realistic fear that information gathered from individuals would be misused. Any inhibition which appellants in this case suffer is attributable, not to what the Army is presently doing, but to their own imagination as to what it might do at some unknown time in the future. Therefore, it is inaccurate to contend that the Army's present surveillance activity is the source of the inhibitions which appellants allege. *Compare* Bee See Books, Inc. v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968).

[2] There are no allegations that the Army has conducted surveillance of wholly private activity and at oral argument appellants

Appellees gathered this information from public sources and open meetings in much the same manner that newspapers cull information. However, there is one difference, *i.e.*, the newspapers publish much of the information they obtain, whereas the Army merely retains it for possible use by it in the future and this may not necessarily include any publication of the information. Such information is intended to be used to help suppress civil disorders in the event the military are called out in conformance with statute[3] for that purpose. Other

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indicated, in effect, that they did not have any witnesses who would testify that the Army had engaged in such activity. *Compare* Local 309, United Furniture Workers of America v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948).

[3] Statutory authority for the Army's activity in relation to civil disorders is contained in 10 U.S.C. §§ 331-33 (1964):

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

10 U.S.C. § 331.

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

10 U.S.C. § 332.

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—
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> (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that

obvious proper uses by the Army for such information may be judicially noticed from public incidents of the period and would include helping prevent and solve crimes involving destruction, threat of destruction, or theft of military draft records, military supplies, military research and other Government property and facilities at draft centers, armories, military bases, forts, arsenals, military training centers and military suppliers and research centers operating under military contract.

In the instant complaint there are no allegations or claims that any of the information gathered by the Army has been used in a manner that has injured plaintiffs or imposed on them any penalty attributable to their exercise of their First Amendment rights. In fact, appellants acknowledge in their brief that the uses to which the collected information might be put by the Army are *unknown*:

> In the case at bar there is something more subtle at stake than the threat of prosecution and criminal sanctions present in *Dombrowski*, *supra*. There is a threat of *unknown* surveillance, *unknown* purpose, and *unknown* future use of the information gathered and recorded in connection with the defendants' civilian intelligence network. *This creates a substantial chilling effect upon the free and uninhibited exercise of First Amendment rights.*

(Emphasis added) (App. br. p. 40).

Such indefinite and abstract assertions of amorphous fears do not present a case involving facts of a concrete nature. Appellants' admission, *supra*, that the "threat"

State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

10 U.S.C. § 333.

of which they complain is "unknown," as the latter words is used by appellants, means that the threat is

> "Not knowable . . . cannot be comprehended . . . beyond the limits of human experience, or of human powers of apprehension or understanding." *Webster's International Dictionary* (2d ed.)

Such indefinite claims of highly visionary apprehensions that are admittedly based in abstractions which cannot be comprehended, or are beyond human experience or understanding, do not present a case involving facts of sufficient realism and definiteness to confer jurisdiction on the court to make a sweeping constitutional decision affecting important activities of the federal Government. There is nothing more here than a highly abstract claim based on an imaginary fear that governmental power to collect information for a valid purpose will be misused for an *improper* purpose. Similar fears might exist with respect to any governmental power. All power is susceptible of misuse, but that truism when coupled with unfounded fear alone is not sufficient to make out a case for judicial jurisdiction. What is necessary before a court is authorized to assume jurisdiction is some allegation from which it can be concluded that the apprehension of the misuse of governmental power is a realistic possibility. Because of the absence of any such allegation here it is my view that a proper case or controversy does not exist. *Davis* v. *Ichord*, —— U.S.App.D.C. ——, —— F.2d ——, (Nos. 23426 & 23427, Aug. 20, 1970); *Golden* v. *Zwickler*, 394 U.S. 103, 108, 110 (1969).

Since the claim of the named plaintiffs does not present a case or controversy, nothing is added by the fact that it has been framed as a class action. *Davis* v. *Ichord*, *supra*, slip op. at 16 n.19. *See generally* 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 567 at 308 (Wright rev. 1961); 3 J. MOORE, FEDERAL PRACTICE ¶ 24.04 (1969). As Judge Johnsen remarked in *Kansas City, Mo.* v. *Williams*, 205 F.2d 47, 51 (8th Cir.), *cert. denied*, 346 U.S. 826 (1953):

> It is of course necessary generally that a plaintiff be able to show injury to himself in order to entitle

him to seek judicial relief. He cannot be a mere volunteer and ask judicial intervention simply "because someone else may be hurt", but he "must present facts sufficient to show that his individual need requires the remedy for which he asks." McCabe v. Atchison, T. & S. F. Ry. Co., 235 U.S. 151, 162, 164, 35 S. Ct. 69, 71, 59 L.Ed. 169.

Moreover, even if I were to agree with the majority that appellants' claim was ripe, I would seriously question whether the action was an appropriate class action. When one considers the great number of people that the named plaintiffs seek to represent, their highly varied backgrounds and activities, and that it is the constitutional right of the individual that is sought to be protected, it is obvious that a great many highly individualized questions would be presented. The record of each protestor, and each protest activity, might have to be considered separately and might necessarily result in different determinations as to whether the Army was justified in making a record of his public activities for possible future reference. Under such circumstances there is a serious question whether the complaint presents "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2).[4] *See generally Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). The importance of this requirement is heightened by recognition of the vast numbers of people appellants seek to have rise *or fall* on the strength of the showing they make in this suit. *See* FED. R. CIV. P. 23(c)(3).

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[4] FED. R. CIV. P. 23(a) provides:

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

It should also be noted that it is Congress that is empowered by the Constitution "to make rules for the Government and regulation of the land and Naval forces" (U.S. CONST. Art. I, § 8, cl. 14) and judicial notice may be taken that Congress is presently conducting public hearings upon the policy questions involved in this very area where the named plaintiffs here seek judicial intrusion.[5]

Finally, the trial court here concluded:

> The Court holds that what in effect the plaintiffs are complaining of here is that the Army is keeping the type of information that is available to all news media in this country, covered by all news media in this country, and which is in the morgues of the newspapers in this country and magazines,[6] and

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[5] 117 CONG. REC. S. 985 (daily ed., February 8, 1971) reports the announcement by Senator Ervin that the Senate Judiciary Subcommittee on Constitutional Rights had scheduled hearings on Computers, Data Banks and the Bill of Rights. On September 8, 1970, Senator Ervin outlined the purpose and scope of the study. In this regard, it is well to note that the issues appellants seek to have litigated in this suit are tremendously complex, involving broad questions of both law and policy. Recognition of this complexity, recognition of the fact that courts generally become less and less able to deal competently with controversies the farther removed they are from the "impact of actuality" and recognition of the "legitimating function" of a judicial decree, *see* A. BICKEL, THE LEAST DANGEROUS BRANCH 30-31 (1962), all counsel against finding the present controversy ripe too early. In my view, resolution of the issues presented by appellants is much better undertaken, at this juncture, by the Congress than it is by this court.

[6] There was a great deal of material in which the Army had an obviously legitimate interest stemming from the following factual situation, as outlined in the brief of appellee:

> [O]ur Nation, during the Summer of 1967, witnessed the tragic riots in Detroit and Newark and, for the first time in 25 years, the Army was called in to assist the local civilian authorities in quelling the Detroit disturbances. During the period 1967-68, the National Guard was called upon 83 times and the Army four times to quell cases of civil disorder. The March on the Pentagon, the disturbances at the Democratic Convention, and the rioting in the Nation's Capital, which left large areas of the City leveled, all required the use of the

> the Court holds that they state no cause of action; they show no unconstitutional action on the part of the Army; they show no threats to their rights. And I will sustain the motion to dismiss and I will deny the preliminary injunction . . . .

It is my view that we should affirm the action of the trial court and wait until a case appears involving some person who alleges a more tangible basis for the claimed threat to his rights. Certainly since these investigative activities began in 1965, if they were the great peril to the populace that appellants argue, there must be one individual who can be found to complain of an injury caused by a concrete threat of the *actual misuse* of such information. To the extent indicated above, I respectfully dissent.

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armed forces to bring order out of the chaos. It has been reported that during the month of April 1968 alone, there were 237 civil disorders, 27,000 arrests, 43 deaths, over 58 million dollars in property damages, and over 58,000 National Guard and Army troops had to be used 25 times to quell the civil disturbances. *U.S. News and World Report,* September 2, 1968. See also the Brandeis University Lemberg Center for Study of Violence Reports; *Disorders—1968,* by the General Adjustment Bureau, Inc.; *Riot and/or Civil Commotion Report* by the American Insurance Association.

SUPREME COURT OF THE UNITED STATES

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, ET AL.,
PETITIONERS

v.

ARLO TATUM, ET AL.

ORDER ALLOWING CERTIORARI—Filed November 16, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

★ U. S. GOVERNMENT PRINTING OFFICE: 1971 481126 338